

No. 12889

United States
Court of Appeals
for the Ninth Circuit.

GENERAL ACCIDENT FIRE AND LIFE AS-
SURANCE CORPORATION, LTD., a Cor-
poration,

Appellant,

vs.

VIKING AUTOMATIC SPRINKLER COM-
PANY, a Corporation,

Appellee.

Transcript of Record

Appeals from the United States District Court,
Northern District of California,
Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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In the District Court of the United States, in and
for the Northern District of California, South-
ern Division

No. 29779

GENERAL ACCIDENT FIRE AND LIFE AS-
SURANCE CORPORATION, LTD., a Cor-
poration,

Plaintiff,

vs.

VIKING AUTOMATIC SPRINKLER COM-
PANY, RED AND BLUE COMPANY, a Cor-
poration; BLACK AND WHITE COMPANY,
a Co-partnership; FIRST DOE, SECOND
DOE,

Defendants.

COMPLAINT FOR DAMAGES

Comes now the plaintiff above named, and for
cause of action against defendants complains and
alleges:

I.

The plaintiff does not know the true names of the
defendants sued herein as Red and Blue Company,
a corporation, and Black and White Company, a
co-partnership, First Doe and Second Doe; that said
defendants are sued herein by fictitious names, and
plaintiff prays leave to insert their true names when
the same are ascertained.

II.

That at all times herein mentioned plaintiff is a

corporation organized under the laws of the United Kingdom of Great Britain and Scotland and is a resident of said Kingdom and is authorized to and is doing business in the State of California, engaged in the business of writing and issuing policies of public liability insurance; that at all times herein mentioned The Austin Company was and is a corporation authorized to do and doing business in the State of California; that at all times herein mentioned the defendant, Viking Automatic Sprinkler Company, was a corporation organized and existing under the laws of the State of California and was authorized to do and is doing business in the Northern District of the State of California.

III.

That prior to the 23rd day of July, 1946, plaintiff issued a policy of public liability insurance, by the terms of which it promised and agreed to indemnify The Austin Company against liability for personal injuries incurred during the course of certain construction operations then being conducted and to be conducted by The Austin Company.

IV.

That in the City of Oakland, County of Alameda, State of California, on or about the 23rd day of July, 1946, the defendants entered into a written contract with The Austin Company, whereby defendants agreed among other things to furnish to The Austin Company all labor, mechanics, material, tools, equipment, supplies and services necessary to perform all sprinkler work in connection with cer-

tain buildings then being erected by The Austin Company at San Francisco Municipal Air Port (Mills Field), in the County of San Mateo, State of California; that in said contract, defendants were designated as "vendor," and Austin Co. was designated as "buyer"; that by the terms of said contract, defendants agreed as follows:

"Insurance—It is understood and agreed that vendor is fully covered with Public Liability, Workmen's Compensation and Property Damage insurance and agrees to protect and indemnify the Buyer against all claims for damages, law suits, etc., which may arise due to difficulties encountered while vendor is servicing this operation."

V.

That defendants entered into the execution of said contract and, in the months of June and July of 1947, defendants used certain of their employees in and about said San Francisco Municipal Air Port for the purpose of carrying into effect and executing said contract; that while said employees were so working in said months of June and July, 1947, two of them were injured at said San Francisco Municipal Air Port, as hereinafter more particularly stated; that said injuries to said employees arose out of and were connected with difficulties encountered while defendants were performing said contract and servicing said operation mentioned above.

VI.

That one Homer Taylor was an employee of said

defendants as above mentioned, and while working at said San Francisco Municipal Air Port was injured on the 11th day of June, 1947; that he subsequently brought an action in the Superior Court of the State of California, in and for the County of San Mateo, against The Austin Company, being numbered 43554, wherein he alleged that he sustained certain personal injuries as the result of the negligence of the defendant, The Austin Company, and sought damages in the sum of \$50,000.00; that The Austin Company gave notice of said action and demand to defendants, and demanded the protection afforded by the terms of said contract above referred to; that defendants failed, refused and neglected to protect The Austin Company from said claim or demand; that under the terms of the policy of public liability insurance hereinabove mentioned, plaintiff was required to and did defend said action for and on behalf of The Austin Company; that in order to minimize further damages and losses, plaintiff settled said claim and paid to said Homer Taylor and to the Pacific Indemnity Company (a workmen's compensation insurance company that had paid certain industrial benefits to said Taylor) the sum of \$4400.00; that said sum so paid to said Homer Taylor by plaintiff was and is less than the sum claimed by said Homer Taylor and was and is a reasonable settlement of the claim of said Homer Taylor; that in addition thereto, plaintiff incurred and paid the sum of \$368.51 attorneys' fees in the defense of said action, which said sum is fair and

reasonable; all to the damage of plaintiff in the sum of \$4,768.51.

VII.

That one Daniel Estrada was an employee of said defendants as above mentioned, and while working at said San Francisco Municipal Air Port was injured on the 28th day of July, 1947; that he subsequently brought an action in the Superior Court of the State of California, in and for the County of San Mateo, against The Austin Company, being numbered 43853, wherein he alleged that he sustained certain personal injuries as the result of the negligence of the defendant, The Austin Company, and sought damages in the sum of \$100,000.00; that The Austin Company gave notice of said action and demand to defendants, and demanded the protection afforded by the terms of said contract above referred to; that defendants failed, refused and neglected to protect The Austin Company from said claim or demand; that under the terms of the policy of public liability insurance hereinabove mentioned, plaintiff was required to and did defend said action for and on behalf of The Austin Company; that said Daniel Estrada prosecuted said action to a final judgment against The Austin Company in the sum of \$12,679.70, principal and cost; that plaintiff paid to said Daniel Estrada said sum of \$12,679.70 in full satisfaction of said judgment; that in addition thereto, plaintiff incurred and paid the sum of \$987.09 attorneys' fees in the defense of said action, which said sum is fair and reasonable; all to the damage of plaintiff in the sum of \$13,666.79.

VIII.

That plaintiff has incurred an expense in the preparation of its claim against defendants in the way of attorneys' fees, and will incur other and additional expense for services of attorneys in the prosecution of this action; and the sum of \$3,000.00 is a reasonable sum to be allowed as their attorneys' fees herein.

IX.

That as direct and proximate result of the foregoing, plaintiff is damaged in the sum of \$21,435.30.

X.

That demand has been made by plaintiff upon said defendants for said amounts, but defendants have refused, and still refuse, to pay said amounts to plaintiff.

Wherefore, plaintiff prays judgment against defendants for the sum of \$21,435.30, and costs of suit herein incurred, interest, and other and further relief as it may be entitled to.

HEALY AND WALCOM,

/s/ HEALY AND WALCOM,

Attorneys for Plaintiff.

State of California,

City and County of San Francisco—ss.

Harry Hutchinson, being first duly sworn, deposes and says:

That he is an officer of the plaintiff General Accident Fire and Life Assurance Corporation, Ltd., a

corporation, to wit: its Principal Representative and Branch Manager for Northern California; that as such, he is authorized to verify the foregoing Complaint for Damages on behalf of said plaintiff; that he has read the same and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief and as to those matters, that he believes it to be true.

/s/ HARRY HUTCHINSON.

Subscribed and sworn to before me this 25th day of May, 1950.

[Seal] /s/ AGNES M. COLE,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires August 28, 1951.

[Endorsed]: Filed May 25, 1950.

[Title of District Court and Cause.]

NOTICE OF MOTION

To the Plaintiff, General Accident Fire and Life
Assurance Corporation, Ltd., a Corporation, and
to Healy and Walcom, Its Attorneys:

Please take notice that the undersigned will, on the 17th day of July, 1950, at the hour of 10:00 o'clock a.m., or as soon thereafter as counsel can be heard before the above-entitled court, The United States Courts & Post Office Building, 7th and Mis-

sion Streets, San Francisco, California, move the above-entitled court for an Order dismissing the complaint of plaintiff on file herein on the following grounds:

1. That the complaint fails to state a claim against defendant upon which relief can be granted.

BOYD, TAYLOR & REYNOLDS,

By /s/ ROBERT F. REYNOLDS,
Attorneys for Defendant, Viking Automatic Sprinkler Company.

Memorandum of Points and Authorities

Rules of Civil Procedure for the District Courts of
the United States, Rule 12 (d).

175 A.L.R. pps 29-36 inclusive.

Receipt of copy acknowledged.

[Endorsed]: Filed July 7, 1950.

[Title of District Court and Cause.]

ORDER

As in the case of Pacific Indemnity Co. v. California Electric Works, Ltd., 29 Cal. App. (2d) 260, there appears to be a latent ambiguity in the contract provisions in issue here, requiring the taking of testimony to explain what the parties meant by said provisions and to determine whether the contract was intended to indemnify the plaintiff against

its own negligence. Defendant's motion to dismiss is therefore denied.

Dated: July 24th, 1950.

/s/ HERBERT W. ERSKINE,
U. S. District Judge.

[Endorsed]: Filed July 24, 1950.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, Viking Automatic Sprinkler Company, a corporation, and answering the Complaint on file herein, denies, admits and alleges as follows:

I.

Answering paragraph II of said Complaint, admits that the Viking Automatic Sprinkler Company was a California corporation, authorized to do and doing business in the Northern District of the State of California.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of said paragraph, and placing its denial on said grounds, denies the same.

II.

Answering paragraph III, said defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained

therein, and placing its denial on said grounds, denies the same.

III.

Answering paragraph IV of said Complaint, defendant admits that portion starting at line 19, with the word "That," and continuing to line 28, and up to and including the word "California."

Denies the balance of said paragraph.

IV.

Answering paragraph V, defendant admits the allegations of said paragraph, commencing with the word "That," on line 2 of said paragraph, and continuing to and including the word "stated," on line 9 of said paragraph.

Denies the balance of said paragraph.

V.

Answering paragraph VI of said Complaint, defendant admits the allegations thereof, starting with the word "That," on line 14, through and including the word "defendants" on line 24 of said paragraph.

Denies the allegations starting with the word "and," line 24 of said paragraph, through and including the word "demand" on line 27 of said paragraph.

Defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations of the balance of said paragraph, and placing its denial on said grounds, denies the balance of said paragraph.

VI.

Answering paragraph VII of said Complaint, defendant admits the allegations thereof, starting with the word "That," on line 11, through and including the word "defendants" on line 21 of said paragraph.

Denies the allegations starting with the word "and," line 21 of said paragraph, through and including the word "demand," on line 24 of said paragraph.

Defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations of the balance of said paragraph, and placing its denial on said grounds, denies the balance of said paragraph.

VII.

Denies the allegations of paragraphs VIII, IX and X.

VIII.

Further answering said Complaint, and as a separate, distinct and affirmative defense thereto, defendant alleges that The Austin Company was negligent and careless in and about the matters set forth in said Complaint in that they failed to use due or any care or caution for the safety of others, and that said acts of carelessness and negligence on the part of The Austin Company proximately caused the injury sustained by Homer Taylor on or about the 11th day of June, 1947, and Daniel Estrada on or about the 28th day of July, 1947; that said The Austin Company would, therefore, not be entitled

to recover for damages caused by its own negligence or wrongdoing and plaintiff, as The Austin Company's public liability insurance carrier claiming a right of subrogation, has no greater right than its insured and is, therefore, not entitled to a judgment for damages.

Wherefore, defendant Viking Automatic Sprinkler Company, a corporation, prays that plaintiff take nothing by its action, and that the same be dismissed, and that defendant be granted its costs of suit herein, and such other and further relief as the court may deem just.

BOYD, TAYLOR & REYNOLDS,
Attorneys for Defendant, Viking Automatic Sprinkler Company, a Corporation,

By /s/ ROBERT F. REYNOLDS.

State of California,
City and County of San Francisco—ss.

P. W. Diggle, being first duly sworn, deposes and says:

That he is an officer of the defendant, Viking Automatic Sprinkler Company, a corporation, to wit: its President; that as such, he is authorized to verify the foregoing Answer on behalf of said defendant; that he has read the same and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief and as to those matters that he believes it to be true.

/s/ R. W. DIGGLE.

Subscribed and sworn to before me this 21st day of August, 1950.

[Seal] /s/ NINA HOLDER,
Notary Public in and for the City and County of
San Francisco, State of California.

Receipt of copy acknowledged.

[Endorsed]: Filed August 24, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This cause came on regularly to be heard before the above-entitled Court, the Honorable Louis E. Goodman presiding with a jury, on the 15th day of January, 1951, plaintiff General Accident Fire & Life Assurance Corporation, Ltd., a corporation, appearing by its counsel Healy & Walcom by John J. Healy, Esq., and defendant Viking Automatic Sprinkler Company, a corporation, appearing by its counsel Boyd, Taylor & Reynolds, by Richard A. Boyd, Esq.;

Thereupon, oral and documentary evidence was introduced by and on behalf of the parties hereto and at the conclusion of the plaintiff's case, a Motion to Dismiss was made by the defendant and the Court having considered all of the testimony and the arguments of counsel and all of the evidence and being fully advised in the premises, now makes the following:

Findings of Fact

I.

That plaintiff, General Accident, Fire & Life Assurance Corporation, Ltd., a corporation, is now and was at all times herein concerned, a corporation duly organized under the laws of the United Kingdom of Great Britain and Scotland and is a resident of said Kingdom and is authorized to and is doing business in the State of California engaged in the business of writing and issuing policies of public liability insurance;

II.

That at all times herein concerned, The Austin Company, a corporation, was and is a corporation authorized to do and doing business in the State of California;

III.

That the Viking Automatic Sprinkler Company, a corporation, was at all times herein concerned a corporation organized and existing under the laws of the State of California, and was at all times authorized to do and was doing business in the Northern District of the State of California;

IV.

That prior to the 23rd day of July, 1946, the plaintiff issued a policy of public liability insurance by the terms of which it promised and agreed to indemnify and insure The Austin Company against liability for personal injury incurred during the course of certain construction operations conducted

in behalf of the United Air Lines by the Austin Company, as the general contractor;

V.

That in the City of Oakland, County of Alameda, State of California, on or about the 23rd day of July, 1946, the defendant entered into a written contract with The Austin Company whereby defendant agreed, among other things, to furnish to The Austin Company all labor, mechanics, tools, equipment, supplies and services necessary to perform all sprinkler work in connection with the proposed United Air Lines building at Mills Field, South San Francisco, California, on a time and material basis under which the defendant received a fee of 10% for overhead and 8% for profit based on the total sum of the cost of the work plus overhead;

VI.

That in said contract dated July 23, 1946, The Austin Company was designated as buyer and defendant was designated as vendor and that Paragraph 7 of the purchase order and contract No. 4231 provided as follows:

“Insurance—It is understood and agreed that vendor is fully covered with public liability, workmen’s compensation and property damage insurance and agrees to protect and indemnify the buyer against all claims for damages, law suits, etc., which may arise due to difficulties encountered while vendor is servicing this operation.”

VII.

That one Homer Taylor was an employee of defendant and while working within the course of his employment at said Mills Field on the 11th day of June, 1947, received injury resulting from the sole negligence of The Austin Company, its agents, servants and employees; that the defendant, its agents, servants and employees, were not guilty of contributory negligence that partially contributed to the accident resulting in injury to the said Homer Taylor; that an action was filed in behalf of the said Homer Taylor against The Austin Company, that was settled by the plaintiff under the terms of the policy of public liability insurance issued to The Austin Company by payment of the total sum of \$4,768.51; that in addition thereto plaintiff incurred and paid the sum of \$299.59 in the investigation and defense of said action;

VIII.

That one Daniel Estrada was injured on the 28th day of July, 1947, while working within the course of his employment for the defendant at Mills Field, as the result of the sole negligence of The Austin Company, its agents, servants and employees; that the defendant, its agents, servants and employees, were not guilty of negligence proximately contributing to the happening of said accident; that following the trial of said action, a payment was made by the plaintiff under its policy of insurance with The Austin Company in satisfaction of final judgment against The Austin Company in the sum of \$12,-

697.70; that plaintiff incurred and paid the sum of \$1,692.44 in attorneys' fees and expenses in defending the action brought against The Austin Company by said Daniel Estrada;

IX.

That plaintiff has withdrawn and dismissed its claim for expenses in the preparation of its claim against defendants by way of attorneys' fees and additional expenses of services alleged in paragraph 8 of said Complaint;

X.

That the defense of said actions were tendered to defendant, but defendant refused to accept the same.

XI.

That demand was made by plaintiff on said defendant, prior to the filing of this action, for payment of the above amounts but defendants have refused to pay said amounts to plaintiff;

XII.

That paragraph 7 of the contract between the defendant and The Austin Company is ambiguous; that the plaintiff has failed to prove that the parties to the contract intended that the defendant indemnify the plaintiff or The Austin Company for damages resulting from the sole negligence of The Austin Company, its agents, servants and employees;

XIII.

That the provisions of the contract itself are not susceptible to an interpretation that the defendant

agreed to indemnify The Austin Company for injuries received in accidents resulting from the sole negligence of The Austin Company, its agents, servants and employees;

XIV.

That the plaintiff has failed to present facts sufficient to sustain the allegations of the complaint in this case; that there is nothing presented by way of evidence by the plaintiff in this case to prove that the defendant intended and agreed to reimburse The Austin Company for payments made in behalf of The Austin Company resulting from accidents and injuries sustained by reason of the sole negligence of The Austin Company, its agents, servants and employees;

XV.

That all of the amounts mentioned herein are and were reasonable.

From the foregoing recitation of the Findings of Fact, the Court makes the following:

Conclusions of Law

1. That the Court has jurisdiction over the parties on the subject matter.
2. That defendant's Motion to Dismiss this case is granted.
3. That the plaintiff failed to prove that the parties to the contract intended that the defendant indemnify The Austin Company for damages and costs incurred by reason of the sole negligence of

The Austin Company, its agents, servants and employees.

Let a Judgment on defendant's Motion to Dismiss be entered accordingly.

Dated this 29th day of January, 1951.

/s/ LOUIS GOODMAN,
Judge of the District Court.

Approved as to form:

/s/ HEALY & MALCOM,
Attorneys for Plaintiff.

/s/ BOYD, TAYLOR & REYNOLDS,
Attorneys for Defendants.

[Endorsed]: Filed January 29, 1951.

In the District Court of the United States, in and
for the Northern District of California, Southern
Division

No. 29779

GENERAL ACCIDENT FIRE AND LIFE AS-
SURANCE CORPORATION, LTD., a Cor-
poration,

Plaintiff,

vs.

VIKING AUTOMATIC SPRINKLER COM-
PANY, et al.,

Defendants.

DECREE

This cause came on regularly to be heard before the above-entitled Court, the Honorable Louis E. Goodman presiding with a jury, on the 15th day of January, 1951, plaintiff General Accident Fire & Life Assurance Corporation, Ltd., a corporation, appearing by its counsel Healy & Walcom, by John J. Healy, Esq., and defendant Viking Automatic Sprinkler Company, a corporation, appearing by its counsel Boyd, Taylor & Reynolds, by Richard A. Boyd, Esq.

Thereupon, oral and documentary evidence was introduced by and on behalf of the parties hereto and at the conclusion of the plaintiff's case, a Motion to Dismiss was made by the defendant, and the Court having considered all of the testimony and the arguments of counsel and all of the evidence, and defendant having made, signed and filed herein

its Findings of Fact and Conclusions of Law which are by reference made a part hereof, and being fully advised in the premises;

Now, Therefore, by reason of the law and evidence and the Findings of Fact and Conclusions of Law,

It Is Hereby Ordered, Adjudged and Decreed that the complaint on file herein be dismissed and that plaintiff take nothing by said complaint.

It Is Further Ordered, Adjudged and Decreed that defendant recover its taxable costs in the amount of \$.

Done this 29th day of January, 1951.

/s/ LOUIS GOODMAN,
U. S. District Judge.

[Endorsed]: Filed January 29, 1951.

Entered in Civil Docket Jan. 30, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED
STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

Notice Is Hereby Given that the plaintiff General Accident Fire and Life Assurance Corporation, Ltd., a corporation, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain decree and judgment entered in the above-entitled action on the 30th day of January, 1951.

Dated: February 27, 1951.

HEALY AND WALCOM,

/s/ JOHN J. HEALY,

Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed February 27, 1951.

In the District Court of the United States for the
Northern District of California, Southern
Division

No. 29779

GENERAL ACCIDENT, FIRE & LIFE ASSUR-
ANCE CORPORATION, a Corporation,
Plaintiff,

vs.

VIKING AUTOMATIC SPRINKLER COM-
PANY, a Corporation, et al.,
Defendants.

Before: Hon. Louis E. Goodman, Judge.

REPORTER'S TRANSCRIPT OF RECORD
ON APPEAL

Monday, January 15th, 1951

Appearances:

For the Plaintiff:

MESSRS. HEALY & WALCOM, by
JOHN J. HEALY, ESQ.

For the Defendants:

MESSRS. BOYD, TAYLOR &
REYNOLDS, by
RICHARD A. BOYD, ESQ.

(This cause came on regularly for trial this date. The Jury was duly impaneled and sworn to try the cause, whereupon the following proceedings were had:)

The Court: Would you care to make an opening statement in this matter?

Mr. Healy: Thank you.

Opening Statement on Behalf of the Plaintiff

Mr. Healy: May it please your Honor and members of the Jury: This case, I might say, is a little unusual, but we think rather simple.

We must keep in mind these various parties, so I will emphasize their names so that you will have them in mind.

The Austin Company is a nationwide organization that is engaged in the business of building various types of contruction, various buildings and so forth. It had a contract with the City and County of San Francisco, I believe, or perhaps it was with the United Airlines—that isn't important at the moment—to build certain hangars and buildings at Mills Field. It was general contractor on the job, and it was on that job for about a year and a half. It did not do all the work itself, but it engaged the services of what are commonly called sub-contractors to perform various functions, and the sub-contractor that we are interested in [2*] here is called the Viking Company.

That is the company that is represented by Mr. Boyd, the company that is being sued here. It entered into this contract with the Viking Company

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

to install a sprinkling system in these various hangars or buildings that were later to be used in the aircraft industry.

Now it entered into this contract I think it was in June of 1946, and at the time that it entered into the contract and for several months prior thereto, it, that is to say, the Austin Company, was insured under a very general policy of comprehensive liability insurance, commonly called a comprehensive liability policy, and that would, in substance, agree to pay any loss or any liability that would be imposed by law, is the way it reads—any liability that would be imposed by law upon it, the Austin Company, for any of its operations throughout the United States, including of course, this job at Mills Field.

The company that issued that policy is the plaintiff. That is the company that I represent. That is the company that this gentleman who sits to my right is the manager of, and who will be our first witness. His name is Mr. Siebold. The plaintiff is the General Accident—the exact name is General Accident, Fire & Life Assurance Corporation, Limited. It is a corporation that is organized under the laws of Great Britain, having its main office in this country in [3] Philadelphia, and it is authorized to and was doing business in California.

I have mentioned we have three parties—the General Accident, Fire & Life, the Viking Company and the Austin Company.

And the Viking Company at the time that the contract—or rather I should say sub-contract—was

entered into, this sub-contract provided as follows—and the contract will be introduced in evidence, or at least a photostat of it:

“It is understood and agreed that the vendor”—The vendor is elsewhere described in the contract as being the Viking Company, that is, the company putting in these sprinklers——

“It is understood and agreed that the vendor is fully covered with public liability, Workmen’s Compensation and property damage insurance, and it is further agreed that it agrees to protect and indemnify buyer”——

and the buyer is elsewhere referred to as the Austin Company——

“against all claims for damages, lawsuits, etc., which may arise due to difficulties encountered while vendor is servicing this operation.”

In other words, the Viking Company, which is the vendor referred to, agreed to carry liability insurance on this job and agreed to reimburse the Austin Company for any [4] loss that the Austin Company might sustain on the job due to damages, lawsuits and so forth.

Two men, workmen and employees of the Viking Company, one named Estrada, the other man’s name was Taylor—were both injured on the job. One was injured when he fell down an open unguarded hole, and the other man was working and a clam bucket crane came along and the thing collapsed and he was injured. Both of those men, Estrada and Taylor, were employees of this Viking Com-

pany, that is the sprinkler company. They brought suits in San Mateo County against Austin Company. One of them was tried before a Jury.

Let me go back just one second. They brought suit against the Austin Company claiming that they were hurt because of the negligence of the Austin Company. These suits were brought in San Mateo County.

The Taylor case was settled.

The Estrada case was tried before Judge Scott and a Jury, and resulted in a verdict of \$150,000 in favor of Mr. Estrada.

On a motion for a new trial——

The Court: Who was that suit brought against?

Mr. Healy: That was against Austin. I will repeat, Estrada was suing Austin.

The Court: Estrada was an employee of the Viking Company? [5]

Mr. Healy: Yes, your Honor, he was an employee of the Viking Company. These two men were employees of this Viking Company, and they sued the Austin Company claiming that they were hurt because of some dereliction upon the Austin Company. I guess they were right, because one got \$15,000—I will tell you about the other one in a moment. On the motion for a new trial it was cut down to \$12,500. And in stepped the plaintiff, my company, the General Accident, and paid it.

I want to withdraw that so you get the chronology of the thing.

Right after the suits were filed the Austin Company referred it to the General Accident Company,

Mr. Siebold's company, for defense, and they engaged the services of a well known firm of attorneys in San Francisco, Messrs. Bronson, Bronson & McKinnon, to represent the Austin Company.

They made demand, however, on Viking; they said, "Here, you are supposed to take care of this"; but Viking did not do anything.

The Estrada case was tried before Judge Scott and, as I said, resulted in a \$15,000 verdict, was cut down to twelve thousand and there were some odd dollars costs. We have the exact checks on it.

With regard to the other gentleman, Mr. Taylor, that case did not go to Court. There was a suit filed, but it was settled for Forty-four hundred odd dollars, I think the [6] figure was. Both those amounts were paid by the General Accident Company, and also they paid incidental expenses that we will show you, checks for attorneys' fees and Court reporters and a number of little matters.

Members of the Jury, and your Honor, the whole thing in a nutshell, so to speak, is, the General Accident Company, having paid these losses—one of over \$12,000 and one of \$4400, plus some expenses, is seeking to get this back from the Viking Company, that had agreed under its contract to—I need not read it to you again—to protect and indemnify the Austin Company against all damages, lawsuits and so forth.

Just one further word. The General Accident Company, I believe His Honor will instruct you as a matter of law, having paid expenses in that as-

sumed, or, as we lawyers say, it is subrogated to the rights of this Austin Company.

That is the case. We intend to prove that.

His Honor asked us earlier whether there was any factual issue to be presented. Mr. Boyd will probably tell you what his contentions are. We think that is just it; that we can prove all those things, and if so, we are going to ask you for a verdict for an amount, computing all these figures together, will probably be \$16,000, or more than that—sixteen or seventeen thousand dollars.

The Court: Do you wish to make your statement at this time? [7]

Mr. Boyd: Yes, if I may, your Honor.

Opening Statement on Behalf of Defendants

Mr. Boyd: May it please your Honor and ladies and gentlemen of the Jury and counsel: It is now my privilege, as attorney for the Viking Automatic Sprinkling Company, to outline for you generally our position in this case and the facts that we expect to prove, after which, after the facts are introduced by the evidence and the law is given to you by his Honor, we will request that you return a verdict in favor of the defendants in this action.

As has been indicated by his Honor and by Mr. Healy, this is a most unusual situation. My clients are engaged in the automatic sprinkler business. They install the automatic sprinklers around various buildings, new and old and in the process of construction.

Some time in 1946, the Austin Company, who are nationwide general contractors, entered into a contract with the United Airlines to construct and build the maintenance base, the various buildings and so forth, that will be described for you generally around the San Francisco Airport. And I am sure we are all familiar with that recent construction down there.

Now at the time that the general contract was started, the Austin Company did carry insurance, we assume, as has been alleged, with the General Accident, Fire & Life Assurance [8] Society or Company of Great Britain, protecting them for suits of negligence that resulted from the operation of this work down there from their own negligence.

In July of 1946 the Austin Company had some conferences with my clients' representatives relative to the construction of the sprinkler system in these new buildings that were being constructed around the airport.

Well, it so happened at that time that the Austin Company had not set out any definite plans or specifications for the installation of the sprinkler systems, so an agreement was entered into between the Viking Company and the Austin Company providing that the Austin Company would award the sprinkler job to the Viking Company on what is generally referred to as a cost-plus contract, whereby the Austin Company would pay my clients the actual cost of their labor and materials, plus an allowance for overhead expenses and an allow-

ance for profit, which was eight per cent on this particular job.

Included in that contract were certain provisions as to the operation and the work, by which the Austin Company agreed to construct all the scaffolds and they would generally supervise the work, and provided generally that when a certain part of a building was ready for a sprinkler system, we were to go in, put in the sprinkler system and would bill them for the labor and material. [9]

This contract, ladies and gentlemen, is really drawn up on three different types of forms. One is a printed form of some four pages that has been printed by the Austin Company and is used apparently on all of their jobs all over the country or wherever they operate, and that refers generally to the contractor and sub-contractor relationship and provides that we will install an automatic sprinkler system on a cost-plus basis. Then attached to that contract—and as has been indicated, these contracts will be introduced in evidence—is a multigraphed or mimeographed form that is referred to as Section A: “General conditions for sub-contractors,” some of which might apply to this particular operation, some of them couldn’t possibly apply. But the general multigraphed form was attached to the printed form.

And then on top of that there is what is called a purchase order, on a form that was printed by the American Sales Book Company of Niagara Falls, New York, which contains certain provisions, and refers to the buying and selling of products—

that is the vendor-buyer relationship; and in this purchase agreement attached to the printed contract, and attached to the general provisions of the multigraphed form, there are certain provisions including "Shipping notices," "Car loads," "Cartage or packages"; terms as to the payment of bills with two per cent deducted for cash if paid before the 15th of the month, and a provision that—I will read this to [10] you, "That the vendor"—that would be my client—"agrees to protect and indemnify the buyer"—that would be the Austin Company—"against all claims for damages, lawsuits, etc."—et cetera, or, and so forth, or whatever you might want to call it—"which may arise due to difficulties encountered while vendor is servicing this operation." Now that is the provision of the contract under which we have been requested to pay some \$21,000 to the General Accident Fire & Life Assurance Company.

In accordance with the provisions of the contract and in accordance with the laws of the State of California, the Viking Company obtained a Workmen's Compensation insurance policy with the Pacific Indemnity Company, and in July of 1947 one of our employees, Mr. Taylor, was working under a bridge that had been constructed by the Austin Company.

The Court: Just a moment, counsel. The remainder of the Jurors need not wait; you won't be needed any further today.

Go ahead, counsel.

Mr. Boyd: Keep in mind we are in the sprinkler

system business; we are not contractors for construction. And there was a ditch that was dug by the general contractor, the Austin Company, and we put our water mains in there. So they built a bridge across this ditch. This was the Austin Company, insured by the General Accident. And the Austin Company provided [11] all heavy equipment, and they had a big crane that was used for various purposes around this job. So one of our men, Mr. Taylor, was working under this particular bridge, and without any warning or anything else they ran this crane over the bridge and mashed it down and mashed Mr. Taylor, and Mr. Taylor did file a suit against the Austin Company and he charged them with negligence. We paid, or rather Pacific Indemnity Company in our behalf, paid compensation benefits to Mr. Taylor, and after the entire matter was over, suit was filed and so forth, the General Accident, under their policy for which they received premiums from the Austin Company, did pay Pacific Indemnity Company the amount that they had paid and they made a settlement with Mr. Taylor. In other words, ladies and gentlemen, we will prove that the accident to Mr. Taylor was occasioned entirely by the negligence of the Austin Company and their employees in running a crane over a temporary bridge and mashing it down on Mr. Taylor.

Now the second man was Daniel Estrada. In July of 1947 he was working in the building constructed by the Austin Company insured by the General Accident, and in the construction of this

particular portion of the building the Austin Company had left a large hole which was a stair well, and they ultimately were going to put a stairway in this hole, and one of our employees, Estrada, fell into this hole and received injuries, and he too employed an attorney and filed a [12] suit against the Austin Company, and he alleged in his complaint that the Austin Company wilfully and negligently and carelessly—now this is Mr. Taylor; Taylor alleged that the Austin Company wilfully, negligently and carelessly caused this crane to run over the plaintiff. And that was paid.

And in the suit filed by Mr. Estrada, or in his behalf, it was alleged that the Austin Company was the general contractor and in complete charge of the construction of this building, and that they were negligent in leaving this hole without any barricades or covering or anything else, and by reason thereof Mr. Estrada was injured.

As counsel pointed out, that case was tried, and the Jury found that Mr. Estrada was entitled to damages from the Austin Company and from their insurance company, General Accident, by reason of the negligence of the Austin Company, and they awarded damages of \$15,000, or whatever it was, which was paid by the General Accident, we assume.

And Taylor paid back the money that our compensation insurance company, the Pacific Indemnity Company, had paid, to which they were entitled to a lien under the law.

Now the question that we will be confronted with is, what was the intention of the parties? I

don't mean the General Accident Fire & Life Insurance Company Limited of Great Britain, Ireland or wherever it is located—what was the intention of the parties, that is the Austin Company and [13] the Viking Company, as to the interpretation of this contract?

And in that connection, ladies and gentlemen, we will prove that at the time of these accidents, the General Accident Insurance Company—I believe that was Mr. Siebold probably, this gentleman here—took these contracts and he wrote a letter to the Viking Company that I represent outlining in general the facts, and stating that

“These accidents should be covered by you and should be taken care of by you and you should reimburse us and take over and hold us harmless,”

and so forth, and he sent that letter to the Austin Company. And Mr. Sims, their auditor, took a look at this letter and said in effect, “We wouldn't do anything like that at all.” This was back in 1947.

Thereafter it appears, and we will prove by the auditor of the Austin Company, whom we have subpoenaed—we will prove that some time later, approximately eighteen months after these accidents occurred, Mr. Siebold again requested that the Austin Company write a letter to us demanding that we take over the defense and pay for these lawsuits, and we will prove that at that time, ladies and gentlemen, some eighteen months after the accidents

happened, the home office of the Austin Company in Cleveland, Ohio, said, "Well, all right, you can go ahead, because we have had trouble with the Viking Company on a job in Chicago and they wouldn't cooperate with us and [14] they wouldn't do anything about it. So you go ahead and tell the insurance company to go ahead and sue the Viking Company" or words to that effect.

Now, ladies and gentlemen, we will further prove that the Viking Company is a California Company; we know nothing of what went on in Chicago. The Viking patents are handled by various companies in various parts of the country. We have the State of California under our license. We don't know what went on in Chicago. But we will prove that the Austin Company, their local man here who negotiated this contract, wouldn't even let the General Accident go ahead and file this suit until he obtained permission, and he did not obtain permission until some eighteen months later when there was some controversy in Chicago.

Keep in mind that this is a cost-plus contract by the Austin Company, not the General Accident; that the Austin Company agreed to pay us for our expenses and to give us a profit on this particular operation of eight per cent. That was our margin of profit for putting in the sprinkler system, for using our engineering experience and our ability as contractors. All during the time and every month, or roughly once a month, these matters were brought up, what work was completed, and so forth. Every month we would go to the Austin Company and say,

“Gentlemen, we have done this, we have furnished this material, and so forth. Here are the [15] invoices; you check them with your receiving clerks,” and so forth, “and figure out what we have done, and pay us what amounted to eighty-five per cent of it under the contract,” as will be brought out. So this went on all this time after these accidents happened clear on through up until December of 1948, when they finally decided that we should talk these things over and we negotiated and we agreed on settlements for our materials, we agreed on everything with the Austin Company, and there was never a single word said by the Austin Company to the Viking Company about paying for these claims, paying for the attorneys’ fees that were spent by the General Accident, and nothing was ever said by anyone about the Austin Company even wanting us to indemnify them against their own negligence until after an agreement was reached and the contract was all straightened out, the payments were made, everything was fine, and then the question came up as to whether or not we would indemnify the General Accident Assurance Company who took a premium for the protection of Austin Company’s negligence.

Now, ladies and gentlemen, I am sure that this is a complicated issue. I hope that I haven’t made it more complicated by my discussion here, but it all boils down to this: what did the parties intend? The Austin Company, not the General Accident. We know what they intended, but that has nothing to do with it. What did the Austin Company and

the [16] Viking Company intend by these words, "protect and indemnify the buyer"—not the general contractor, the buyer—"against all claims for damages, lawsuits, etc."—and so forth, etc., it says in so many words—"which may arise due to difficulties."

We expect to prove, ladies and gentlemen, that we never had any intention of agreeing to go into the insurance business and assuming the liability of the Austin Company. We had no intention to take over claims resulting from their own negligence.

Mr. Healy: It strikes me counsel is arguing the case and has been for some time. I didn't want to interrupt.

The Court: I think he is through now, counsel.

Mr. Boyd: In other words, ladies and gentlemen, we did not intend and we are certain that the Austin Company did not intend that this provision under a buyer-vendor agreement printed by the American Sales Book Company of New York, Niagara Falls or some place, was not intended by the Austin Company and by the Viking Company to hold harmless and protect the Austin Company.

We will ask that after all the evidence is introduced that you will decide the case on the facts and the law as it will be given to you by his Honor, and we will ask that you return a verdict in favor of the defendant Viking Automatic Sprinkler Company. Thank you.

The Court: The Jury may take a brief recess at this [17] point. Please bear in mind that when you are absent from the Court Room it is your duty not to talk about the case among yourselves, nor are

you to let anybody else talk to you about the case, nor are you to form or express any opinion in this matter until the case is finally submitted to you, if it is. Will you take the Jury out for a brief recess, please.

(Thereupon the Jury retired from the Court Room and the following proceedings were had in the absence of the Jury:)

The Court: Gentlemen, I have heard the opening statements on both sides, and I am completely in the dark as to what possible question could be submitted to the Jury in this case. Why are we spending money for a Jury trial on a matter that is obviously solely and wholly a question of law as to the meaning of the provisions of this contract?

Mr. Healy: We did not demand a Jury.

The Court: I am not concerned with who demanded the Jury. We have got a Jury summoned here. I see no reason for incurring the expense in having the Jury sit here on a question of law, counsel. It is no concern to me who requested the Jury or whether both sides requested the Jury or not. The only question in this case obviously, on the statements that both of you have made, is whether or not under this provision of the contract this insurance company is entitled to recoup the loss which they suffered on the policy which they insured the Austin Company for liability upon the part of the Austin [18] Company; whether it can recover this amount from the defendant company under the provision of the contract the interpretation of which is a matter of law, that is all.

Mr. Healy: I thought so.

The Court: What am I going to submit to the Jury in this case? I can't say to the Jury, "Is the defendant liable?" because that means that the Jury has to say what is meant by that provision of the contract.

Mr. Healy: I would think there would be a directed verdict.

The Court: In other words, there is nothing that counsel have said that raises any issue of fact.

Mr. Boyd: As I understand the matter, if your Honor please, the intentions of the parties is a question for the Jury.

The Court: The intention of the parties doesn't arise out of any disputed question. Whatever you have said is something that couldn't possibly be disputed: that your client never at any time agreed that it would be liable for these losses and took that position.

I don't know; it seems to me offhand, that the plaintiff has a pretty heavy burden in this case. I don't know what the theory is upon which it is entitled to recover. I understand there are some similar cases cited in some California authorities to me, but I am of course not familiar [19] with what they hold. Mr. Healy, with respect to this particular provision of this contract, it seems to me that it is wholly a question of law.

Mr. Boyd: My—rather, I will say our position on the matter, if your Honor please, was that the question of intent of the parties is a question of fact for the trier of the facts.

The Court: The question of intent is a question of law. I think that what you are confused about is that it may be if there is any dispute as to the facts. There is no factual question to be resolved, and the mere fact that there may be a dispute of law as to what that means in terms of intent doesn't make it a question for the Jury. If you have a question such as "Did a certain conversation occur on a certain day?" or "Did the defendant write a certain letter?" and there is a dispute as to whether they wrote the letter or as to whether they had the conversation, then I can submit a special interrogatory to the Jury, "Did the defendant write this letter?" "Did this conversation occur on such and such a day?" But if there is no dispute as to what occurred, the question of intent is one of law. What have you said or has the plaintiff said in the opening statement that presents a question upon which the parties disagree or any dispute as to what occurred?

Mr. Healy: I have not.

The Court: He said the same thing you have said. [20]

Mr. Boyd: We haven't gone into the question of accord and satisfaction or anything of that nature up to the present time.

The Court: That also, as far as I see it, if it has any merit, is a question of law.

Now the plaintiff has not disputed or won't make any point that the parties did not settle up all their contractual affairs without any particular mention of this, unless I am in error—without mention of this insurance question. They are contending that you

are liable because of the provision of this contract; is that right?

Mr. Healy: That is right.

The Court: That is the only basis of their contention. That is the only question of law. I am rather curious, Mr. Healy, as to the legal basis for the right to recovery here.

Mr. Healy: There are two cases in California——

The Court: Not that I am prejudging it.

Mr. Healy: There are two cases in California that are squarely in point. One of them was discussed with your Honor in this case that came up here.

The Court: I knew I had heard about this question some place.

Mr. Healy: That was the De Lucci and Devenenzi and Haskins case. I represented the people, but I had nothing to do with that phase of it. I think your Honor later decided that following [21] the case of Southern Pacific Co. vs. Fellows, 22 Cal. App. (2), 87, and another case in 29 Cal. App. (2).

The Court: That is Pacific Indemnity Company against California Electric Company.

Mr. Healy: Those two seem to be right in point.

The Court: Even if they hold that you can recover and be subrogated on a claim that arises out of your own negligence——

Mr. Healy: Yes, that is right.

The Court: The question still remains as to whether under this provision of the contract, with

this provision in the contract it gives that right.

Mr. Healy: That is a law question.

The Court: That is a law question, it seems to me.

Mr. Healy: I think it is. I think, your Honor, if we prove that, as I am certain we can, I think your Honor would have to direct the Jury to render a verdict for the plaintiff, I really think so.

I can see a possible factual issue on the reasonableness of the attorneys' fees that this company paid to the Bronsons, but if Mr. Boyd and I couldn't get together on it and not take up your Honor's time and the Jury's time, it is a sad state of affairs.

The Court: It would seem to me the only question is what is the meaning of this provision in that contract? Is [22] that provision of the contract such a provision as would constitute an undertaking on the part of your company that would give rise to a liability upon the theory that these California cases go on. And that it seems to me is purely a question of law. We would have the contracts in front of us, and what the circumstances were at the time that the contracts were entered into, what kind of a transaction it was. And then we would have to say what is meant by that provision of the contract. And I would say that that presents a question that at first blush would be one that is very strongly in favor of the defendant, as to whether or not that means that they were intending to indemnify, to hold the other party to the contract

harmless from liability from any source under the contract—that may arise from any cause under the contract, which I think was the case in these California cases, wouldn't it?

Mr. Healy: Yes. The California cases are just directly in point. They are decided by separate and distinct Courts right at the same time.

The Court: Counsel, I am not asking either side to try a case before the Court in preference to a Jury; I have got plenty to do. As a matter of fact it makes no difference to me one way or the other. The parties have a right to a Jury; I am a firm believer in the Jury system; if there is any factual question I wouldn't say one word to even indicate to any side in a case that they should try that question of fact before a [23] Court rather than before a Jury, because it is their right to have a Jury and I firmly believe in that; that it is better to have a Jury if anybody has any question about it when there is a factual question. But for the life of me I can't see what is involved in this case that I could submit to the Jury. This case could be submitted to the Court; put the documents in evidence and make a statement of the facts, and the whole matter could be submitted to the Court in a few hours, whereas we would be keeping a Jury here for two or three days to listen to witnesses testifying something that isn't in dispute concerning the circumstances, or what the contract was, the parties involved, what they did under the contract. There is no question that these men were paid upon the theory that their injuries arose out of the negli-

gence of the Austin Company, otherwise they would not have been paid, of course. So it is an established fact that it was their negligence. The only question is, under this provision of the contract was there any liability on the part of the Viking Company to take up the burden of this insurance, and to pay this loss because of this provision in the contract. What question of fact can I submit to the Jury?

Mr. Boyd: It is just a question—I don't know, if your Honor please; we may be prejudging——

The Court: I will keep the Jury here if you want, but it is obvious to me that it could only be in an advisory [24] capacity. The question as to whether there is liability under this provision of the contract is the only point in dispute.

There are always factual questions in most cases, but the question is, are those factual matters pertinent and material. There may be some dispute as to what occurred on a certain day, for example, but you don't have to keep the Jury here unless that is vital to a determination of the question of the meaning of the contract. There is nothing that you have said, either of you, which would indicate to me that there is anything like that involved here. I will keep the Jury if you want and it can act in an advisory capacity on a question of fact if there is one presented at any time that has any bearing on it, but I don't think that counsel should demand a Jury if it is only in some advisory capacity, because unless it is something that vitally bears on the law question——

Mr. Healy: I am willing, your Honor, to suggest this: that the matter be submitted to your Honor on the two opening statements made and further agree that the heart of the case is the construction of that clause, and leave it to your Honor as a trier of fact and a trier of law, if there is a mixed question, should there be, to decide it, and submit it to your Honor.

The Court: I don't ask you to submit any question of fact to me where there is a Jury present.

Mr. Healy: I am willing—— [25]

The Court: We are engaging in this discussion because it has occurred to me that at this point I do not see what I could spell out in the way of a special interrogatory, for example, that I could ask the Jury to answer in this case that would have any bearing on the decision as to what that provision of the contract means.

Mr. Boyd: I take it that your Honor feels the question of intent is entirely one of law rather than of fact. Am I correct in that, sir?

The Court: The way you have stated the case, I would say that is so, because you have not stated any factual controversy. There is nothing in the way of factual controversy; there may be facts that are necessary to be found upon which to base the decision as to the intent of the parties, and those facts themselves may not be in dispute. I don't know what you have in mind. What you said to the Jury, Mr. Boyd, was that "We are going to submit to you this question and we are going to show you that the defendant did not intend by this contract—

that there was no intention under the circumstances to be bound to pay any such loss as occurred in this case." That is what you would argue to the Jury.

Mr. Boyd: Yes.

The Court: You don't say anything, though, that would indicate that the basis upon which you wanted the decision from the Jury was in dispute as to any question of fact. [26]

Mr. Boyd: Your Honor, of course, counsel has not challenged what the facts are. I mean, he stated his case very generally. I don't know what facts he is going to prove.

The Court: You both have stated your cases. It is just as clear, it seems to me, as the day follows the night, that all you have got here is a question, taking into account the circumstances under which the contract was executed, what does it mean? Where is there any Jury question in this case? There might be in some cases; if one of you said there was a conversation between the parties before the contract was executed and one party said, "I said to John, 'This only covers in such and such kind of cases' and John agreed with me in that" and then if we had a question as to whether or not that conversation took place that way and there was a dispute, "I said one thing and John said the other thing"; then you would have a dispute which would have to be first resolved before you could determine whether or not that conversation explains an ambiguity in the contract. But if you haven't got a dispute as to the factual matter, why, then,

there is nothing to do except to decide whether the circumstances, undisputed as they are, give rise to one or the other interpretation of the meaning of the contract.

What do you say? I am willing to take a little longer on this thing if you will tell me what particular fact, what factual matter you say is in dispute. [27]

Mr. Boyd: Well, it seems to me that the—I don't think that the contract itself can be held to be ambiguous, so it is a question of the intent. I don't know what the plaintiff is going to say the various conversations were and what went on, and so forth.

Mr. Healy: I am not going to say anything.

The Court: Apparently, as indicated by his opening statement, he is not relying on anything except the provision of the contract.

Mr. Boyd: The provision of the contract without any proof, without any evidence to explain the ambiguity or anything else?

Mr. Healy: Right.

Mr. Boyd: Then, frankly, if your Honor please, I don't know whether this procedure is proper under District Court procedure or not, but I would certainly like to make a motion for a non-suit on the opening statement.

The Court: We have no such proceeding for non-suit. You would have to make a motion to dismiss. But that would involve the same question that was presented to Judge Erskine except that the Court will have before it the actual contracts.

Mr. Healy: The whole contract.

The Court: And all of the factual matters that are at the basis of the right of recovery. Then on your question of the motion to dismiss will arise a question as to whether or [28] not that provision does give a right of relief under these facts and circumstances to the plaintiff; and if you are right about that, then you win your case on a motion to dismiss.

Mr. Boyd: I certainly feel that, in view of counsel's statement that he is going to introduce no evidence as to the intent of the parties, that certainly he has not added anything to the case.

The Court: I take it he has to present in evidence his contract of insurance. He has to present these contracts in evidence and he has to make some showing as to the nature of the damage which the insurance company has suffered, what it has paid out. He has to satisfy those allegations of the complaint, because I see some of them were not admitted. So you would have to make a showing as to what took place, then he would show the terms of his contract, and he would submit his case on the terms of his contract. Then you could make your motion to dismiss.

Mr. Boyd: Certainly if that is all he is going to do, it certainly won't take him very long to introduce the evidence.

The Court: Then maybe we had better keep the Jury on, let the plaintiff put on his evidence, and you make your motion to dismiss and we can argue it. We can do all of that today without any trouble.

Mr. Boyd: I am sure we can. [29]

The Court: Don't you think that would be a good procedure, to put in whatever evidence you want to present in the matter to sustain the allegations of the complaint, plus the prayer, and then with that evidence before us we can see whether or not a motion to dismiss would be granted. If it is denied, unless there were some kind of evidence to present that would raise a factual issue, that would be sufficient to sustain a judgment for the plaintiff; and if what you have presented does not present sufficient, then the matter would be determined on the granting of the motion for dismissal.

Mr. Healy: Yes, your Honor.

Mr. Boyd: I think that would be the proper way.

The Court: Much of this you can stipulate to, can't you, to save time?

Mr. Healy: We will show you all our files. We have brought them over.

May I offer this suggestion: It is twenty minutes to 12; if Mr. Boyd and I can perhaps sit down here for twenty minutes a lot of this could be cut away, and the Jury be asked to return at two o'clock.

The Court: You feel you maybe could do it between now and 12 o'clock? After all, what you are going to do is to go over what you have probably lined up.

Mr. Healy: I think so. [30]

Mr. Boyd: There is only one thing. I will ask you frankly, is there any question that you paid entirely on the basis of sole negligence insofar as

the Austin Company is concerned; in other words, you were indemnifying yourself against your sole negligence? I wanted to bring that out.

The Court: Of course I don't think you need that, because the insurance policy I take it will be offered, will it not?

Mr. Healy: Well, at least we would have references to it.

The Court: Then you will have to present the judgment or payment.

Mr. Healy: We have got photostatic copies of the checks.

The Court: And there isn't any question, of course—you have said that to me a moment ago—that the insurance company wouldn't have paid unless they felt that there was negligence on the part of the Austin Company.

Mr. Healy: Absolutely.

The Court: Because that is what they were insuring against, so there can't be any question as to that.

Mr. Boyd: There is no claim of negligence on the part of the Viking Company?

Mr. Healy: I think there was at one time, Mr. Boyd, but that doesn't enter into this.

Mr. Boyd: That will simplify it; that there is no [31] claim of negligence against the Viking Company, the only claim is against the Austin Company. Their payment is evidence of that.

Mr. Healy: We thought so at one time, but it doesn't enter into this.

The Court: The Reporter has been going pretty

steadily. I think maybe we will take a recess until two o'clock. Bring the Jury back. Then you can be prepared to submit what you want before the Jury, Mr. Healy.

Mr. Healy: Yes, we will try to make the effort——

The Court: Get the papers together that you want to introduce and have them all ready.

Mr. Healy: Yes, Judge.

The Court: I think that Judge Erskine's decision was quite proper. When you only have before you a motion you do not have the opportunity to evaluate some of these questions, and it is always better to get more evidenciary light on a question before deciding a motion to dismiss.

Mr. Healy: In other words he did not have the full contract; he only had one provision. If your Honor is passing on this matter as a matter of law at any stage of the game, you will have the whole contract, which should shed light on its meaning.

The Court: You have everything before you which you consider necessary to make up your mind. [32]

Mr. Healy: Yes, because Judge Erskine——

Mr. Boyd: As I understood it, for the purpose of the motion, it was stipulated that the negligence was entirely the negligence of the Austin Company, wasn't it?

Mr. Healy: I don't know if it was stipulated, but I assure you, Mr. Boyd, it was, or they wouldn't have paid it.

Mr. Boyd: As far as the motion to dismiss before Judge Erskine——

The Court: You needn't put the Jury in the box, if you will just have them stand up right there.

(At this point the Jury was brought into the Court Room.)

The Court: It is not necessary to go in the box, because I am going to dismiss you until two o'clock. I just want to be sure that the Jurors are all here.

Members of the Jury, we have been discussing some legal questions that I think will materially shorten this case, so I am going to excuse you until two o'clock. Please return at two o'clock, and bear in mind the admonition which the Court has given you.

(Whereupon an adjournment was taken until two o'clock p.m. this date.) [33]

January 15, 1951, at 2 P.M.

Mr. Healy: We have accomplished quite a bit, your Honor, Mr. Boyd and I, in discussing the case and have agreed on certain stipulations that will materially cut down the taking of testimony and evidence.

We have stipulated that a document which I hold in my hand and will hand to the Clerk and ask that it be received in evidence, is the contract between the Austin Company and the Viking Company; that it is dated July 23, 1946, and it has attached to it certain specifications; they should all be considered as one instrument.

And may I further say, your Honor, that that is a photostatic copy. Of the first two sheets we have duplicate originals, so they will ask that they be received at the same time. They are a little more legible to read.

The Court: Very well. Plaintiff's No. 1, will that be?

The Clerk: Plaintiff's Exhibit No. 1 introduced and filed in evidence.

(Whereupon contract referred to above was marked Plaintiff's Exhibit No. 1 in evidence.)

PLAINTIFF'S EXHIBIT No. 1

Purchase Order No. 4503 On Each Package and Invoice	
From The Austin Company	Duplicate
District or Job Office, Oakland	Name of Job, U.A.L. Repair Bas
Date of Order, 7-23-46	Charge to or Work Order No. O-38
	Date of Delivery, As Required
Name of Vendor, Viking Automatic Sprinkler Company	
Address 580 Market Street, San Francisco 4, California	
Deliver or Ship to The Austin Company, Mills Field, So. San Francisco	
California.	
Care of United Air Lines.	
Via Railroad or Truck, Your delivery.	

Please Furnish Subject to Conditions Below:

Confirming

Send invoices in triplicate to The Austin Company, 618 Grand Avenue, Oakland, California, 24 hours after delivery.

Furnish all labor, mechanics, tools, equipment, supplies and service necessary to perform all sprinkler work in connection with the proposed United Air Lines Building, Mills Field, South San Francisco, California, on a time and material basis, all in accordance with the General Conditions for Subcontractors pages A-1 to A-6 inclusive dated 8/6/44, your proposal dated July 17, 1946, and our drawings and specifications which will be furnished subcontractor by contractor from time to time during the course of the job.

We require shop drawings in duplicate from subcontractor, one will be approved by contractor and returned to subcontractor, these shop

Plaintiff's Exhibit No. 1—(Continued)

drawings must contain the stamp of approval of the Board of Fire Underwriters of the Pacific. When approved shop drawing is returned to subcontractor by contractor, subcontractor will further furnish contractor four (4) shop drawings to be used in our field office.

Work is to be performed under the supervision of contractor's field superintendent at jobsite.

The following items are included in, and will serve to amplify the definition of "Cost of the Work" as covered by Article III of the attached subcontract:

1. Cut to length steel pipe at Current Crane Company's Random pipe price sheets. Subcontractor to absorb all scrap.
2. Fittings, valves and miscellaneous items at Current Crane Company Discount Sheet less pink sheet discounts.
3. Labor and engineering at subcontractor's prevailing wage rates.
4. Materials not covered in foregoing schedule at Current Wholesale prices.
5. Insurance, social security, taxes, freight, cartage, transportation and incidental expenses at cost.
6. Sprinkler Devices at list, less fifty per cent (50%).
7. No additional charge will be made for the use of subcontractors small tools. All scaffolding and heavy equipment shall be furnished by Contractor.

Only Union Labor and mechanics are to be used on this operation.

Price and Terms: The Subcontract agreement shall consist of this purchase order, the attached subcontract form, the General Conditions or Subcontractors, Pages A-1 to A-6 inclusive, dated 8/6/45, and the drawings and specifications, the terms and conditions of all of which are bound one within the other and all of which together constitute the complete agreement existing between The Austin Company (herein referred to as Contractor) and Viking Automatic Sprinkler Company (herein referred to as Subcontractor).

Accepted: VIKING AUTOMATIC SPRINKLER CO.,

By: /s/ R. W. DIGGLE.

[Cancellation Clause: Illegible on original.]

Article 5 below does not apply.

The following Conditions form a part of this Order:

Shipping Notice—shall be mailed as soon as Material has been forwarded, giving Order Number, Car Number and Initials, also condensed description of Material, otherwise vendor is liable to demurrage.

Invoice in Triplicate.

Car Loads—shall be loaded to minimum capacity—if not, the vendor agrees to pay the excess freight.

Cartage or Packages—no charge will be allowed for either.

Plaintiff's Exhibit No. 1—(Continued)

5. Terms—Bills shall be payable on the 15th of the month following shipment (if material has been received) and 2% deducted.
6. Patents—Vendor agrees to hold and save purchaser harmless from and against all and every demand or demands of any nature or kind by reason of the use of any patented invention, article or appliance, that has been or may be adopted or used in the construction of any of the material or articles called for on this Purchase Order.
7. Insurance—It is understood and agreed that vendor is fully covered with Public Liability, Workmen's Compensation and Property damage insurance and agrees to protect and indemnify the Buyer against all claims for damages, lawsuits, etc., which may arise due to difficulties encountered while vendor is servicing this operation.

THE AUSTIN COMPANY,

/s/ J. F. VIGNONE,
Purchasing Agent.

CC: Owner

MLB:BJM

The Austin Company
Engineers and Builders
Cost Plus a Fee Subcontract

This Subcontract entered into this 23rd day of July, 1946, by and between The Austin Company, an Ohio Corporation of Cleveland, Ohio (hereinafter called "Contractor"), and Viking Automatic Sprinkler Company (hereinafter called "Subcontractor"), for certain work to be performed by Subcontractor in connection with construction work being, or to be performed by the Contractor for United Air Lines (hereinafter called "Owner"), at Mills Field, South San Francisco, California.

Now Therefore, it is hereby agreed by and between the parties hereto as follows:

Article I. Statement of Work

A. Subcontractor shall provide all the necessary materials and perform all of the following work, to be installed on the premises of Owner: for a complete automatic sprinkler system and fire protection system as required in accordance with "General Conditions For Subcontractors," pages A-1 to A-6 inclusive, dated 8-6-45; the specifications (sprinkler system) as called for in P.O. attached and drawings as called for in P.O. attached, which General Conditions, Specifications and Drawings are made a part of this Subcontract.

B. The total estimated cost of the work provided hereunder is to be determined later and is exclusive of Subcontractor's fee, and it is estimated that the work herein contracted for will be substantially completed on or before as required to maintain a rate of speed satisfactory to our Job Superintendent from date

Plaintiff's Exhibit No. 1—(Continued)

hereon. It is expressly understood that neither Contractor, Subcontractor, nor Owner guarantees the correctness of either of these estimates.

Article II. Compensation

In addition to payment for the cost of the work, as defined in Article III, Subcontractor shall receive a fee of Ten Per Cent (10%) for overhead and Eight Per Cent (8%) for profit based on the sum of the cost of the work plus overhead, which shall constitute complete compensation for the services of Subcontractor, including profit and all overhead expense.

Article III. Cost of Work

A. Contractor shall pay to Subcontractor the actual cost of the work as follows:

1. The actual cost of all materials and supplies, including transportation thereof, labor, services, power and fuel necessary for either temporary or permanent use for the benefit of the work.

2. Rental charges for machinery or equipment, whether owned by Subcontractor or rented from others, in sound and workable condition, exceeding \$300.00 in value, as may be necessary for the proper and economical prosecution of the work. The rate and use of such equipment shall be approved by Contractor before commitments are made and shall in no event be higher than the rate permitted by any applicable governmental regulation, or the prevailing rates paid in the locality for similar equipment.

3. Loading and unloading at a site of the work of machinery and equipment owned or rented by Subcontractor and the cost of such minor repairs thereto as shall be less than 2% of the original cost of the equipment repaired; and the transportation thereof to the site of said work and return transportation to the point of original shipment, or equivalent mileage.

4. [Cancelled.]

5. Travel expenses of Subcontractor's supervisors reasonably and necessarily incurred to and from the work.

6. Salaries, for the time devoted to the work, of Subcontractor's superintendents, timekeepers, foremen, supervisors and other field employees. Salary schedule for such employees shall be submitted to Contractor for approval prior to assignment.

7. Premiums on bonds and insurance specifically authorized by Contractor, and fees for permits and licenses required by state and local laws.

8. Payments from his own funds made by Subcontractor under the Social Security Act, and taxes imposed by state and local authorities on Subcontractor's payrolls, and all other taxes paid on account of this Subcontract.

9. [Cancelled.]

10. Buildings, fixtures, equipment and maintenance and op-

Plaintiff's Exhibit No. 1—(Continued)

eration thereof, required for any necessary field office and other facilities at the site of the work, if authorized by Contractor.

11. Sales and/or use taxes applicable to materials purchased by Subcontractor on account of this Subcontract.

12. Such other items of direct cost as may be reasonably and necessarily incurred in the performance of the work hereunder.

B. The cost of the work shall not include any part of the salaries of Subcontractor's officers; general overhead expense incurred in conducting Subcontractor's main office or any regularly established branch office; interest on capital employed or on borrowed money; and federal and state taxes on income of Subcontractor.

C. Subcontractor shall obtain the most favorable discount privileges available in purchasing materials and supplies under this Subcontract, and shall pay bills and accounts rendered for such materials and supplies within the discount period allowed.

Article IV. Payments

A. Subcontractor shall furnish Contractor, on or about the tenth day of each month during the progress of the work, with an itemized statement of the actual cost, as above defined, incurred during the preceding month in connection with the work covered by this Contract, which shall be accompanied by original invoices and payrolls, and such additional copies as may be required. Within ten days after receipt of each such monthly statement, Contractor shall pay Subcontractor for all items of cost actually incurred as shown thereby. If Subcontractor's fee hereunder is on a cost plus a percentage of cost basis, Subcontractor shall also be paid on each monthly statement 85% of the amount of its fee applicable to the actual cost incurred during the preceding month. If Subcontractor's fee hereunder is a fixed fee, Subcontractor shall be paid on each monthly statement 85% of that proportion of its entire fee which the actual cost incurred during the preceding month bears to the estimated cost of all the work covered by this Subcontract.

B. Upon completion of the work and its final acceptance in writing by Contractor, Contractor shall pay Subcontractor the unpaid balance of the cost of the work due it and the balance of its fee, less any sum that may be necessary to settle any claims which Contractor may have against Subcontractor. Contractor shall accept the completed work with reasonable promptness. Prior to final payment, and as a condition thereto, Subcontractor shall furnish Contractor with a verified certificate that all bills and claims have been satisfied, except as stated therein, and a release of all claims against Owner and Contractor arising under and by virtue of this Contract.

C. 1. Subcontractor, for itself and all persons, partnerships or corporations performing labor, doing work or furnishing ma-

Plaintiff's Exhibit No. 1—(Continued)

terials, in and about the erection and construction of said work, hereby expressly waives any and all liens of every kind or nature to which it and/or they are or may be entitled under any act, statute or otherwise.

2. Subcontractor will disclose this provision of this Subcontract to all said persons, partnerships or corporations before any such labor or work is performed or material furnished and before any agreement with reference thereto is made by the Subcontractor.

Article V. Records and Audit

A. Subcontractor agrees to keep records and books of account showing the actual cost to him of all items of labor, materials, equipment and supplies, services and other expenditures of whatever nature for which payment to him is authorized under the provisions of this Subcontract.

B. Owner and Contractor shall, at all times, be afforded proper facilities for inspection of the work and shall, at all times, have access to the premises, work and materials, and to all books, records, correspondence, instructions, receipts, facilities and memoranda of every description.

C. All Subcontractor's employees shall conform to rules and regulations of Owner and Contractor on the premises.

D. Subcontractor shall conform to requirements of Owner and Contractor for records of employment, payrolls, cost distribution, purchasing, receiving of materials and other procedures.

Article VI. Purchase of Materials

A. Subcontractor shall procure Contractor's written approval before subletting any portion of the work or entering into a contract for the purchase of materials for a sum exceeding five hundred (\$500.00) dollars. Subcontractor shall issue purchase orders clearly stating prices, terms, F.O.B. point of shipment and other data as required.

B. Subcontractor shall obtain at least three (3) quotations from reputable dealers in such materials, unless otherwise directed by Contractor.

C. Subcontractor shall provide evidence of the receipt of all materials used in connection with the work.

Article VII. Title to Work and Materials

As between Owner, Contractor and Subcontractor the title to all work completed or in the course of construction at the site, and the title to all machinery, equipment, materials and supplies, wherever located, and the purchase price of which is chargeable to the cost of the work, shall be in the Owner.

Article VIII. Workmanship

Subcontractor shall do the work in accordance with the drawings and specifications and in the best and most workmanlike man-

Plaintiff's Exhibit No. 1—(Continued)

ner, by qualified, careful, and efficient workers, in strict conformity with the best standard practices.

Article IX. Guarantee

Subcontractor shall repair and make good any damages or fault in said work and material that may appear within one (1) year after its completion, as the result of imperfect work done or materials furnished by Subcontractor, when certified to by Contractor as being due to one or both of these causes.

Article X. Alterations and Changes

Contractor may, by written order, issue additional instructions, require additional work or services or direct the omission of work or services covered by this Subcontract. An equitable adjustment of fee due Subcontractor will be made in accordance with the terms of this Subcontract.

Article XI. Assignment

No assignment of this Subcontract shall be made without the written consent of the Contractor.

Article XII. Insurance

Subcontractor shall, during the progress of the work maintain: (a) Workmen's Compensation Insurance for all of its employees employed at the site of the work, or if such insurance is not required by the laws of the state wherein the work is to be performed, Employer's Liability Insurance; (b) Contractor's Public Liability Insurance; and (c) Automobile Liability Insurance.

The limits of liability provided in Subcontractor's Public Liability Insurance Policy shall be \$100,000.00 for injuries, including accidental death, to any one person, and subject to the same limit for each person, \$200,000.00 for any one accident involving two or more persons. Such policy shall also provide for property damage liability of \$10,000.00 for any one accident and subject to the same limit total aggregate liability of \$50,000.00. The limits provided in Subcontractor's Automobile Liability Insurance policy shall be \$100,000.00 for injuries including accidental death, to any one person, or subject to the same limit for each person, \$200,000.00 for any one accident involving two or more persons. Such policy shall also provide a property damage limit of \$10,000.00, covering all owned and rented equipment which is used in or on the work.

Should any part of this Contract be sublet, Subcontractor shall, in addition to the foregoing types of insurance, maintain Contractor's Protective Liability Insurance in the amount of \$100,000.00 for injuries, including accidental death, to any one person, and subject to the same limit for each person, \$200,000.00 for any one accident involving two or more persons, except that Contractor's Protective Liability Insurance need not be maintained to the extent that its Subcontractor maintains Workmen's

Plaintiff's Exhibit No. 1—(Continued)

Compensation, Employer's Liability Insurance and Contractor's Public Liability Insurance, and Automobile Liability Insurance, as above set forth, and provided Contractor is named as an additional insured in such policies of insurance. Certificates of all such insurance shall be furnished to Contractor.

Article XIII. Failure to Perform

If Subcontractor becomes insolvent, or if a petition in bankruptcy be filed by or against it, or if it should make a general assignment for the benefit of creditors, or if a receiver should be asked or appointed for it, or if it should refuse or fail, except in cases for which extension of time is provided, to supply enough properly skilled workmen or proper materials, or if it should fail to make prompt payment to its Subcontractors or for material or labor (except where the liens of all such parties have been effectively waived) or disregard laws, regulations, ordinances, or the instructions of the Contractor, or otherwise be guilty of a substantial violation of any provision of this Subcontract, or should Subcontractor at any time refuse to start said work promptly, or fail in any respect to prosecute the work with promptness and diligence, or if Subcontractor fail in the performance of any of the agreements herein contained, Contractor may, after twenty-four hours' written notice to Subcontractor, provide any such labor or materials, and deduct the cost thereof from any money then due or thereafter to become due to Subcontractor under this Subcontract; and at its option may terminate the employment of Subcontractor for the said work and terminate this Subcontract and may enter upon the premises and take possession for the purpose of completing the work comprehended under this Subcontract, of all materials, tools and appliances thereon, and employ any other person or persons to finish the work, and provide the materials therefor; and in any such case of such termination of Subcontract or discontinuance of the employment, Subcontractor shall not be entitled to receive any further payment under this Subcontract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this Subcontract shall exceed the expenses incurred by Contractor in finishing the work and all other charge, expense or damage, such excess shall be paid by Contractor to Subcontractor; but if such expense and damage shall exceed such unpaid balance, Subcontractor shall pay the difference to Contractor.

Article XIV. Arbitration

A. In the event of any disagreement arising under this Subcontract between the parties hereto, it shall, upon written notice of either to the other party, be submitted to three arbitrators for decision. Each party shall choose one arbitrator within ten (10) days after receipt of such notice, the third to be chosen by the two thus selected. The decision of all or a majority of said ar-

Plaintiff's Exhibit No. 1—(Continued)

bitrators shall be final and binding upon both parties to this Subcontract. Such arbitrators' decision shall be delivered to each party in writing on or before ten (10) days after the submission of such questions to them for their decision. Each party shall pay the cost and expense of the arbitrator it selects, but the cost and expense of the third arbitrator and the remainder of the expense of the arbitration shall be borne equally by the parties to this Subcontract.

The foregoing agreement is binding upon the undersigned, their successors, executors, administrators and assigns.

In Witness Whereof, the Parties have executed this agreement in duplicate as of the day and year first above written.

VIKING AUTOMATIC SPRINKLER CO.

By R. W. DIGGLE,
Subcontractor.

THE AUSTIN COMPANY

By J. F. VIGNONE,
Contractor.

Section "A"

General Conditions for Subcontractors

The Austin Company Engineers and Builders

General Requirements

Definition of Terms

The term "Contractor" as used herein designates and refers to The Austin Company.

The term "Best" as applied to materials or workmanship means that, in the Contractor's opinion, there is no superior quality of material or finished article on the market and that there is no better class of workmanship obtainable. The terms "approved," "approved equal," etc., as applied to materials and workmanship mean specific approval by the Contractor in each particular case.

The subcontract documents consist of the Con-

Plaintiff's Exhibit No. 1—(Continued)

tractor's standard form of subcontract agreement, the drawings and specifications together with all modifications thereof incorporated therein prior to the signing. Together they form the subcontract and are complementary and what is called for by any one shall be as binding as if called for by all.

Where the initials "A.S.T.M." are used, the same shall signify "The American Society for Testing Materials."

Conditions Affecting the Work

The subcontractor shall thoroughly familiarize himself with the building site conditions and with the request for quotations, instructions to bidders, bulletins issued prior to the date for receiving proposals, form of proposals, drawings and specifications and shall ascertain shipping and delivery facilities and all matters and conditions which will affect the operation and completion of his work.

Examination of Surfaces

The Subcontractor shall examine and try all surfaces on which or against which his work is to be applied and shall notify the Contractor in writing of all that are not suitable to receive his work—otherwise the Subcontractor shall replace in a proper manner and at his own expense, any of his work which may have to be removed to correct such defects or that is damaged thereby.

Use of Premises

Materials, equipment, etc., may be stored on the premises, but the placing and handling of same shall

Plaintiff's Exhibit No. 1—(Continued)

be subject to the approval and direction of the Contractor.

Owner's Occupancy During Work

The Owner may occupy the adjoining buildings during the progress and execution of the work, but where necessary, in order to permit the work to be properly done, such portion will be vacated as may be required, and the equipment, stock, etc., that seriously interferes with the work will be removed by the Owner, so far as may be reasonable.

The Subcontractor, however, shall do his work in such a way as to make as little annoyance as possible, and so as not to interfere with the occupied areas of the building or its occupants, or with the continuous operation of the Owner's business.

Protections

The Subcontractor shall provide and maintain proper and sufficient protection of all his work and equipment from damage or from loss by theft; shall protect the Owner's and adjoining properties from any and all injuries arising in connection with the performance of his work; and shall make good any such damage or injury so occurring and without any expense whatsoever to the Contractor or the Owner.

Fire Insurance

The Subcontractor shall carry fire insurance on his material and equipment sufficient to protect his interests and the interests of the Contractor and the Owner as their respective interests shall appear.

Plaintiff's Exhibit No. 1—(Continued)

Workmen's Compensation and Public Liability

The Subcontractor shall comply with laws relating to Workmen's Compensation and Public Liability; shall cause his Subcontractors, if any, also to comply therewith; shall exhibit to the Contractor's satisfaction, certificates and evidence of such compliance before the work is begun; and shall continue so to comply therewith during the performance of this work.

Liens

The Subcontractor, for himself and all persons, partnerships, and corporations performing labor, doing work or furnishing materials in and about the erection and construction of his work, shall and does hereby waive any and all liens of every kind and nature to which he and/or they may be entitled under any Act, Statute or otherwise.

Co-operation of Subcontractor

The Subcontractor shall co-operate with the Contractor and with all other Subcontractors employed on the work in order to avoid complications and insure first-class workmanship in every respect, and, in the manufacturing, assembling and erection of his work.

Cutting and Patching

The Subcontractor shall consult with the Contractor and the other Subcontractors, shall leave all chases, holes or openings in his own work as may be necessary for the proper installation of their work

Plaintiff's Exhibit No. 1—(Continued)
and shall carefully fit around, repair, patch and otherwise make his work good after their work has been installed.

In case the Subcontractor fails to provide these chases, holes or openings in his work, he shall cut them afterwards and at his own expense.

Removal of Existing Work

All items of work or materials which are existing and indicated or specified to be removed or necessary to be removed for the proper installation of new work and which corresponds to the items of new work installed by the Subcontractor shall be taken down by him, and shall, unless re-used, become the property of the Owner, except where the detailed specifications direct otherwise.

Repairing and Replacing Existing Work

The Subcontractor shall repair and replace all items of existing work necessary to be removed on account of work of alterations and which correspond to the items of new work installed by him and shall leave all rooms and areas in which work of removals and alterations is done in a complete and refinished condition as far as his work is concerned.

Repairing Damaged Work

The Subcontractor shall at his own expense repair or replace all items of work damaged by him which may be due to his poor or careless workmanship.

Changes in Work

At any time before completion of the work, the

Plaintiff's Exhibit No. 1—(Continued)

Contractor may order additions, omissions or alterations to or in the work, but no such changes shall be made except by written order signed by a duly authorized representative of the Contractor in which the amount to be added to or deducted from the Subcontract price (together with additional time, if any, for the performance thereof) shall be stated.

Permits and Codes

The Subcontractor shall obtain and pay for all permits, give all legal notices, pay all fees required in connection with his work and shall comply with the Federal, State and Local Codes insofar as they apply to his work, and it is hereby agreed that those Codes are as fully a part of these Specifications as if herein repeated or hereto attached.

Subcontractor shall notify Contractor of any discrepancies between drawings and specifications, and code requirements, prior to submitting his bid, and unless otherwise instructed shall be fully responsible for obtaining approval from the proper authorities for completing the installation as shown or called for.

Contracts

Contracts awarded to Subcontractors for furnishing labor, materials and/or equipment covered by these Specifications shall be in accordance with the terms and conditions of Contractor's standard printed subcontract, a copy of which may be seen at the office of the Contractor.

Plaintiff's Exhibit No. 1—(Continued)

Trade Practices

Workmanship shall be of the highest quality throughout, in accordance with the best standard practices of the trade involved, and shall be subject to the approval of the Contractor's representative.

Only union workmen, skilled in the tasks assigned them, shall be employed.

Inspection

All work performed under Subcontract shall be subject to the inspection of the Contractor's representative, whose decisions shall be binding upon all parties.

Guarantee

All materials and workmanship furnished and installed by the Subcontractor shall be guaranteed for a period, from the date of acceptance of the work, as specified in that section of the work involved under these specifications, and as provided in the Subcontract.

Exceptions or Substitutions

Any exceptions as to materials and/or methods as included in these specifications or as shown on the drawings shall be made at the time the Subcontractor's bid is submitted; otherwise the Subcontractor shall assume full responsibility for the furnishing of the materials and/or the performance of the work as specified, and shall at his own (Subcontractor's) expense, pay for any additional costs incurred by substitutions made necessary by reason of the

Plaintiff's Exhibit No. 1—(Continued)

Subcontractor's inability to obtain specified materials.

Rules and Regulations

All work, performed under the subcontract, shall conform to all applicable laws, ordinances and regulations of all governmental bodies having jurisdiction.

Cleaning Up

From time to time or as directed by the Contractor's representative and at the completion of the work, the Subcontractor shall remove from the premises all refuse, debris, surplus material, tools, scaffolding, etc., for which he is responsible and shall leave premises in a clean, orderly and acceptable condition.

Temporary Heat

If temporary heat is required for the work before the permanent heating apparatus is available for use, the Subcontractor shall provide approved salamanders or stoves with smoke pipes to outside of building or other approved heating apparatus, shall provide adequate and proper fuel and maintain fires as required for protecting or drying out his work.

Temporary heating apparatus shall be installed and operated in such a manner that the finished work will not be damaged.

Temporary Light and Power

The Contractor will provide electric outlets located not over 100 feet apart on each floor and the

Plaintiff's Exhibit No. 1—(Continued)

Subcontractor shall provide necessary extension cords and light bulbs required for light and power in connection with his work.

Temporary Water

The Contractor will provide without cost to the Subcontractor, all water used in connection with the Subcontractor's work, and will provide hose connection at available places. The Subcontractor shall provide means of conveying water from this point to the point required.

Admitted January 15, 1951.

Mr. Healy: We have further agreed, Your Honor, that while this work was in progress at Mills Field, two employees of the Viking Company were injured and filed suits in the [34] Superior Court of the State of California in and for the County of San Mateo; and that these injuries that these men received resulted solely from the negligence of the Austin Company; that these men's names were Estrada and Taylor; and in the month of August, Mr. Estrada obtained a judgment of that Court, and in the month of October—excuse me a moment; in the month of August, 1948, he obtained a judgment in that Court of \$15,000, that was reduced to \$12,500 on a motion for new trial, and which was paid; and in the month of April—

The Court: That was paid by whom?

Mr. Healy: I was going to come to that in just a moment. I will read this in.

The Court: Go ahead.

Mr. Healy: And in the month of April, of 1949, a settlement was made with Mr. Taylor; that both of these men were injured while on the job there at Mills Field and within the course of their employment and, as previously stated, solely as a result of the negligence of the Austin Company; that the plaintiff herein, the General Accident Fire & Life Assurance Corporation, pursuant to its policy of public liability insurance and on behalf of its assured, the Austin Company, paid the judgment heretofore mentioned and certain other expenses and attorneys' fees and paid the settlement that I have heretofore mentioned and certain expenses and attorneys' fees, all of which are evidenced by photostatic copies of each and every [35] draft that I hold in my hands and will pass these to the Clerk and ask that they be received as one exhibit. And I will state for the record—and this is subject to correction by Mr. Siebold if it is incorrect—the total amount in the Estrada case was \$14,227.31—strike that, please—\$14,390.14; and the total amount in the other case, the Taylor case, was \$5,068.10; that these expenses for depositions and the like and attorneys' fees were reasonable in amount.

The Clerk: Plaintiff's Exhibit No. 2 introduced and filed in evidence.

(Whereupon photostatic copies of drafts referred to above were marked Plaintiff's Exhibit No. 2 in evidence.)

Mr. Healy: That Messrs. Bronson, Bronson & McKinnon were engaged by the plaintiff herein, they being attorneys-at-law licensed to practise in this State, to represent the assured, the Austin Company, in both of these lawsuits heretofore mentioned; that Bronson, Bronson & McKinnon, at the instance of the plaintiff herein and without the knowledge of the assured, the Austin Company, on or about October 3, 1947, sent a letter, a copy of which I hold in my hand—sent a letter to the Viking Automatic Sprinkler Company demanding that they take over the defense of the Estrada action, and pointing out this paragraph 7 that forms the real basis of this suit.

I now hand to the Clerk that document and ask that that [36] be received.

The Clerk: Plaintiff's Exhibit 3 introduced and filed in evidence.

(Whereupon letter referred to above was marked Plaintiff's Exhibit No. 3 in evidence.)

Mr. Healy: That on or about January 4, 1949, the insured, Austin Company, by Mr. H. A. Sims, its district auditor, at the instance and request of the plaintiff herein, wrote a letter and mailed it to the Viking Company in similar vein to the last exhibit 3, making demand upon the Viking Company to take over the defense of the Taylor case. I now hand that to the Clerk.

The Clerk: Plaintiff's Exhibit 4 introduced and filed in evidence.

(Whereupon the letter referred to above was marked Plaintiff's Exhibit No. 4 in evidence.)

Mr. Healy: That thereafter, and after settlement was made in the Taylor case and on or about December 9, 1949, a letter was addressed from the assured Austin Company to the Viking Company calling attention that a settlement had been made with Mr. Taylor and demanding reimbursement for those amounts. I now hand a copy of that document to the Clerk.

The Clerk: Plaintiff's Exhibit 5 introduced and filed in evidence. [37]

(Whereupon letter referred to above was marked plaintiff's Exhibit No. 5 in evidence.)

Mr. Healy: That is all, Your Honor, except there is——

The Court: Is that stipulation so far made agreeable to the defendant?

Mr. Boyd: May I just make one or two observations pertaining to the stipulation?

The Court: It is not correct?

Mr. Boyd: Yes, but I want to just broaden it; as far as the negligence is concerned, I think that counsel will agree that the negligence was of the Austin Company, its agents, servants and employees; is that correct?

Mr. Healy: Yes, that is.

Mr. Boyd: The Austin Company being a corporation. Of course he stated "sole negligence," but for the purpose of the stipulation it will be understood, I take it, counsel, that there was no negli-

gence on the part of the Viking Company, its, agents, servants or employees, which contributed to the injury of either Estrada or Taylor.

The Court: Of course he said "sole negligence."

Mr. Boyd: I am sure that would cover it, but that explains its original——

The Court: Is that agreeable to you?

Mr. Healy: I will agree to that, yes.

Mr. Boyd: I also understand, counsel, that insofar as [38] this present action is concerned, in which there is a prayer for, I believe, \$3,000 for your services in this action——

Mr. Healy: That is abandoned. That is abandoned.

Mr. Boyd: ——that is abandoned and eliminated from this present action.

And with those qualifications, the stipulations are accepted.

Mr. Healy: And may I state to Your Honor and to you, Mr. Boyd, that these figures and the vouchers or drafts which are in evidence, total a little more than the amount prayed for in the complaint, in that the amount prayed for in the complaint—I will withdraw that—exclusive of the attorney's fees that we sought; the point being just this: that in the complaint we only sought to recover the amounts paid to these two men plus the Court costs, plus the attorneys' fees, but there were some other matters that were later discovered such as a few items of depositions and some investigative work.

The Court: Do you wish to have the complaint amended to conform to that?

Mr. Healy: Yes, may we do that?

The Court: Is there any objection?

Mr. Boyd: No objection. I take it we now have everything in, counsel.

Mr. Healy: Yes, but there is just one more matter. Does this gentleman belong to the corporation? Is he a representative [39] that would know something? I would like to ask him a question or two.

Mr. Boyd: He is a representative, although he was not at the time, so it depends what your purpose is.

Mr. Healy: May I call the gentleman, Mr. Johnson?

The Court: Yes.

Mr. Healy: Will you take the stand, Mr. Johnson.

SAMUEL A. JOHNSON

called as a witness by the plaintiff, being first duly sworn, testified as follows:

The Clerk: Will you please state your full name to the Court and the Jury?

A. My name is Samuel A. Johnson.

Direct Examination

By Mr. Healy:

Q. Are you connected with the defendant Viking Company? A. Yes, sir.

Q. In what capacity?

A. I am an employee, an engineer.

(Testimony of Samuel A. Johnson.)

Q. Are you an officer? A. No, sir.

Q. Are you a manager?

A. Only insofar as I handle things when the manager isn't here.

Q. I will just ask you this: Are you familiar with this [40] contract that is here in evidence between the Viking Company and the Austin Company? A. Yes.

Q. And you are familiar with this paragraph 7 that we have discussed? A. Yes.

Q. I was going to ask you whether or not pursuant to the terms of that contract, your company did in fact take out public liability insurance.

Mr. Boyd: If Your Honor please, that is entirely immaterial. Objected to on that basis; no issue as to whether there is any insurance of any kind as far as its intent was concerned.

Mr. Healy: May I be heard?

The Court: I don't quite see the materiality whether they took it out or not. Their insurance company is not being sued; they are being sued.

Mr. Healy: That is right. But may I read the provision to Your Honor? It says:

"It is understood and agreed that vendor is fully covered with public liability, workmen's compensation and property damage insurance."

It is right on the first page, right down by 7; right down in this corner of the green one. It is more legible.

The Court: All right; I have it. [41]

(Testimony of Samuel A. Johnson.)

Mr. Healy: I intend to show—I think I can show that—that that intent seems to be an essential ingredient, says Mr. Boyd—that they did in fact take out this type of insurance, and not alone that, but they had a contractual endorsement on it, so that they were well insured. If I can prove that, it would have probative value.

Mr. Boyd: If Your Honor please——

Mr. Healy: ——that they did cover this type of situation. So I think it is very material and has considerable probative value.

Mr. Boyd: If Your Honor please, there are no allegations pertaining to insurance, compensation or any other kind in this action; it is entirely immaterial. The only question that is alleged in the complaint and the only one that has been mentioned, is whether or not the agreement that has been entered into was in effect a hold-harmless agreement protecting not the insurance company, but the insured, the Austin Company, for the——

The Court: I am inclined to think that that might not be admissible, because of the fact that one might take out a public liability insurance policy to protect one against something that one might not be liable for. That sometimes happens.

Mr. Healy: Yes, but if they had a contractual endorsement on it, wouldn't it have a probative value that they realized [42] that they were exposing themselves by this contract to a contractual liability as distinguished from a tortuous liability, and paid an extra premium for it?

The Court: It might be competent if the defendant were to offer some evidence by way of rebuttal, or offer evidence on their part to that effect.

Mr. Healy: Very well.

The Court: But I don't think at this stage of the case it would be admissible.

Mr. Healy: Very well, Your Honor. With that in mind I will withdraw my question. You may step down.

Mr. Boyd: Now, may the Jury be instructed that there has been no evidence introduced?

The Court: Yes; the Jury will pay no attention to the discussions which we have just had. They concern a legal question, and there has been no evidence introduced.

Mr. Healy: We rest.

Mr. Boyd: If Your Honor please, at this time I have a matter of law which I would like to take up, if the Jury may be excused.

The Court: All right. You haven't had to listen to very much before you got another recess. Please take a brief recess, and bear in mind the admonition of the Court.

(Thereupon the Jury was excused from the Court Room.) [43]

Motion to Dismiss

Mr. Boyd: May it please Your Honor, at this time I would like to make a motion to dismiss in behalf of the defendant Viking Automatic Sprinkler Company on the grounds that the plaintiff has offered no evidence to prove either as a matter of

fact or of law that the defendant is or may be responsible for the allegations contained in the complaint. The plaintiff has, in effect, introduced what has already been determined as a contract containing ambiguous language, and the contract on its face—the entire contract having been introduced in evidence—is ambiguous and contains certain provisions in a purchase order that conflict with even other portions of the contract itself.

But confining ourselves solely to the paragraph 7 that has been referred to, we find that the wording is simply this:

“Vendor agrees to protect and indemnify the buyer against all claims for damages, lawsuits, etc., which may arise due to difficulties encountered while vendor is servicing this operation.”

Now, by stipulation we have the undisputed fact that the negligence of the insured of the plaintiff was the sole cause of the accident resulting in the injuries to Taylor and Estrada. We have a further stipulation that the negligence of the Viking Company, its agents, servants and employees, in no [44] way contributed to the happening of either of these two accidents. And we have the further stipulation, at least in effect, that the insurance company, the plaintiff in this action, did insure the Austin Company and assumed their legal liability and ultimately made payments under that policy.

It seems to be well established in all cases, and particularly in *Pacific Indemnity Company vs. Cal-*

ifornia Electric Works, 29 Cal. App. (2), 260, that in order to indemnify against your own negligence, it would have to be clearly and plainly stated in the agreement that the other party agreed to relieve the defendant from all liability caused by its own negligence. In that case the Court quoted with approval 31 Corpus Juris, page 450, which provides:

“Where a person is not primarily responsible for the act or wrong which causes the injury, there is no liability on his part to indemnify the one who has paid the damages. Thus a person is not entitled to indemnity for payments made by him on a judgment against him for injuries to a third person, where it is apparent that the judgment was based on his own negligence or wrong or that of his employees.”

The question has been discussed in a great number of cases, and there are quite a few cited in 175 A.L.R., 144, and we have somewhat similar language in some of those citations that we have [45] here:

“In the ‘contractor cases’ the argument has been frequently advanced in defense of the strict construction rule that the interpretative inclusion of the indemnitee’s own negligence under the indemnity agreement would impose upon the indemnitor a liability the extent of which would be uncertain and indefinite and entirely in the hands of the indemnitee—a liability which could not only wipe out all profit but might exceed the total consideration for the job or even the indemnitor’s entire for-

tune. Stress has also been laid upon the 'hazardous' nature of the work the indemnitor is engaged in doing as a contractor or sub-contractor."

Although no evidence has been introduced and the contract has not as yet been read by Your Honor, it does cover the United Airlines construction, it is for a sprinkler system, and it is on a cost-plus basis.

There are several cases that have been cited in A.L.R. and in other digests which seem to clearly state that in order to indemnify yourself against your own negligence, there is no rule or public policy against it, although the Courts will look very carefully to see what the intentions of the parties are before they will do so; and in order to have any of these agreements hold harmless, no matter how broad they may be, and no matter what the wording is, in order to have them hold [46] and indemnify against your own negligence, it is necessary that you specifically provide in the agreement itself the intent of the parties by stating in so many words, "This agreement covers acts of liability, of negligence" and so forth.

Now assuming, as I think we will have to assume, that insofar as this particular purchase order is concerned, as I said in my opening statement, Your Honor, and I am serious about it, it was never intended to cover a contractor-sub-contractor arrangement; and it is actually a form printed by the American Sales Book Company and pertains to the

buying and selling of merchandise, and it is obvious by the conditions down at the bottom——

“Shipping notice shall be mailed as soon as material has been forwarded”——

“Invoice in triplicate”—“Carloads shall be loaded to maximum capacity—if not, the vendor agrees to pay the excess freight”—“cartage or packages—no charge will be allowed for either”—when they get——

The Court: Where do you get the fact that these forms were actually forms prepared by this Book Company?

Mr. Boyd: Right there at the bottom of the agreement. I have an original here, if I may point it out to Your Honor.

The Court: It doesn't appear on the copy. [47]

Mr. Boyd: Here it is, right down there at the bottom.

The Court: Oh, yes, I see. That doesn't appear in the copy. Of course they may have just printed this for the Austin Company.

Mr. Boyd: Well, obviously it is——

The Court: Because it does say at the top that this is the Austin Company. It may be that these stereotyped provisions were prepared by the Book Company, and then it may be that they are just in the business of doing this kind of work. It wouldn't make any difference one way or the other, because it is the Austin Company's form of contract.

Mr. Boyd: May I just point out, insofar as item 5 down there is concerned:

“Bills shall be payable on the 15th of the month following shipment (if material has been received) and 2% deducted.”

Well, now, when we get into the contract itself, that is, the printed contract between the Austin Company and the Viking Company, on page 2 of the printed contract, under the provisions as to payment we have other provisions set out, 85% to be paid when the work is completed, and so forth.

And if Your Honor will note that in the contract itself the compensation is 10% for overhead and 8% for profit based on the sum of the cost of the work plus overhead. There is no provision for any deduction for cartage, packing, hauling and [48] things of that kind. It is all included in the cost-plus contract that has been entered into between the parties.

So it seems to me, under the well established rule that we must take all of the contract and apply it together, the only reasonable interpretation of the contract would be that it was a cost-plus contract and that that purchase order was merely something that was added as something to type up a form. But in any event, limiting ourselves entirely to the provisions of paragraph 7, we have what must be considered as an ambiguous contract. Under those circumstances, by the provisions of the Civil Code and by all of the cases, the rule is that the question of interpretation of an ambiguous contract is based upon the intent of the parties.

Now, we don't have one single word of evidence as to what the parties intended.

As has been held by Judge Erskine when the motion to dismiss was brought up on the pleadings, the contract contains what I believe he referred to as a latent ambiguity, and he said in effect that it would be necessary to introduce evidence to determine the true intent of the parties, dated July 24, 1950.

The Court: Yes, I have that.

Mr. Boyd: You have that. So the plaintiff comes in here. They put the entire contract in evidence, which shows further ambiguities, and they rest their case without even [49] attempting to explain by the parties who made the contract what the intention was, not between the plaintiff and their insured, but between the Austin Company and Viking Company who are the parties that made the contract, even though in my opening statement I think I made it very clear that we denied that it was the intention of the Viking Company to ever hold harmless and protect for their own negligence. I say, in effect, they come in here and rest, introducing no evidence as to what the intention was of Mr. Sims, who is in the Court Room, or of other employees of the Austin Company who were present and entered into the agreement and made this contract.

So I submit to Your Honor that, under those circumstances, the only rules that can be applied are the general rules for the interpretation of contracts, including number 1: When a contract is prepared by a certain party such as this one is—they are printed forms by the Austin Company—and there

is ambiguity, the contract will be construed most strongly against the person causing the ambiguity.

I would like to call to Your Honor's attention two California cases as to contracts, Stein vs. Archibald, 151 Cal. 220, and Caletti vs. State, 45 Cal. App. (2) 305, holding that a contract of indemnity will not be construed to indemnify a person against his own negligence where such intent is not expressed in clear and unequivocal language.

The Court: What case are you reading [50] from?

Mr. Boyd: I am reading from an excerpt taken from those two cases, Stein vs. Archibald, 151 Cal. 220, and Caletti vs. State, 45 Cal. App. (2) 305. They are cases holding that the interpretation of contracts will be against the party who causes the ambiguity to exist. And I am sure Your Honor is familiar with the various rules as to the intent of the parties, and where you have an ambiguity the only way that you can do is to show the circumstances that surround it, and the burden of proof is on the plaintiff to prove what he intended. But in this case, insofar as this motion is concerned, at least, we do not even have an effort made by the plaintiff to carry his burden of proof and show even what he claims was the intent of the Austin Company insofar as this particular contract was concerned. So I will submit to Your Honor that—

The Court: Of course, if that were necessary to be raised as a part of the affirmative burden of proof, then the Court should permit at this time the question that Mr. Healy asked of Mr. Johnson

to be answered, if it is a part of the affirmative burden.

Mr. Boyd: I don't think that insofar as whether or not Mr. Johnson carries insurance would in any way affect in any way the meaning or interpretation——

The Court: If the plaintiff has the burden of showing the true intent of the parties, and as you have just said, he has not carried that burden, then he would have the right if [51] he could show it, if there is any evidenciary matter that might be corroborative of the intent of the defendant.

Mr. Boyd: I agree one hundred per cent that if he has any evidence that would tend to interpret or set forth the intent of the Austin Company to cover this particular situation—any evidence that he has—he not only has the right, as I see it, Your Honor, but also the duty to come forward with his evidence and show what the intent was.

The Court: But you objected to the question that he asked along that line.

Mr. Boyd: That was on the question of insurance.

The Court: Yes, but it was his contention that the fact that the defendant may have taken out insurance to cover the kind of liability that is referred to in paragraph 7 of the agreement might be evidenciary in character as to the intent with which the language in paragraph 7 was used.

Mr. Boyd: Well, I would submit, Your Honor, that the intent of the parties to any agreement should be based primarily on the intent of the man

that is making the claim that the agreement exists and it covers certain things. In other words, we have got to put the General Accident in the same shoes as the Austin Company. There has been not even a policy introduced; I assume that they have a policy and so forth; we don't know the provisions of it, but we at least cannot put them in any better position——[52]

The Court: I think in submitting the case, the plaintiff is assuming that it can have no greater rights than Austin.

Mr. Boyd: I took that assumption.

The Court: No question about that.

Mr. Boyd: Here we have the Austin Company and the Viking Company, two parties to a contract, two parties to an agreement. We have not one single word as to the circumstances surrounding the execution of the contract or their intent.

The Court: I think I understand your point. I would like to hear what Mr. Healy has to say.

Mr. Boyd: Yes, Your Honor.

Mr. Healy: Yes, Your Honor. I have these remarks to make.

I need not call to Your Honor's attention that this is a motion to dismiss, similar in form to a motion for non-suit in the State Court, and I take it the rule is well settled that you must indulge in every legitimate inference against this motion.

There is more, much more, before Your Honor than there was before Judge Erskine. For instance, the entire contract is before Your Honor. Only

paragraph 7 in haec verba was before him, and he did not read it all.

And we must not forget that the contract over on page 3, under Article XII—it is a cost plus a fee sub-contract—on page 3, Article XII three separate and distinct rather [53] long paragraphs dealing with the subject of insurance, requiring this sub-contractor to take out Workmen's Compensation and public liability insurance, setting forth what the amounts are: \$100,000 for injury and death of one person, \$200,000 for two or more persons, and \$10,000 property damage for one accident. A detailed scheme is set up. If you construe that back with paragraph 7—and paragraph 7, as I view it, Your Honor, is in two parts—one might say there are two obligations cast upon this Viking Company under paragraph 7: One, that they are to take out insurance, three different kinds of insurance, public liability, Workmen's Compensation and property; and the other part is that they are to protect and indemnify the Austin Company against all claims for damages.

Constructing all this together, certainly I make bold to say that at least there is an inference—and I am going to state it more strongly than that—but certainly there was an inference that there was to be public liability insurance taken out by this company. To cover what? To cover all losses by the buyer.

My friend Mr. Boyd has indicated to Your Honor the following propositions of law:

1. That a contract to indemnify another against his own negligence is not per se against public policy. And I agree. But he has indicated that such a contract will be [54] strictly construed. I think that is right. I think that is right.

But he has further indicated that such a contract will not be so construed unless it specifically says against one's own negligence. That is not the rule. This 22 California Appellate (2), the case of Southern Pacific against Fellows—I don't know if Your Honor has it on your desk or not——

The Court: No, I have not.

Mr. Healy: 22 California Appellate (2), at page 87, Southern Pacific against Fellows. The facts are very similar to this. I can recite them to Your Honor very quickly. The Southern Pacific was building a roundhouse.

Would it be too much trouble to ask the Clerk or Bailiff to get 22 Appellate (2) just so I can read Your Honor a sentence out of it. But if I may continue, I will state the facts very simply.

Mr. Boyd: May we also have the other case at the same time, 29 California (2)?

The Court: I have that here.

Mr. Healy: The Southern Pacific Company were building a roundhouse down south some place. They engaged the services of one Mr. Fellows as sub-contractor; they were operating as general contractor; themselves and he sub-contracted to do certain work thereunder. As I read the opinion, there was a big track running along down the building and two cranes were [55] running on that. Mr. Fellows, the

sub-contractor's, employees were operating one of these cranes. One of Mr. Fellows' men was sitting astride an iron beam near a live wire performing some work, and the Southern Pacific man was derelict in that he did not turn off the juice and the employee was severely injured and he brought suit in the United States District Court and he got a judgment for \$25,000 against the Southern Pacific Company, it was affirmed and the Southern Pacific paid it. Then they took a look at their contract that they had with Mr. Fellows, which is no broader than the one before Your Honor and in which I want to call Your Honor's attention to the fact that this agreement does not say against the Southern Pacific Company's negligence; I was going to point out the very place to Your Honor there, and the Court says that such language is broad enough to cover the negligence of Mr. Fellows or the negligence of the Southern Pacific.

The Court: The provision in this Fellows case and that provision in the Pacific Indemnity case are much more specific than the provision in this case. The provision in the Fellows case is that "The contractor expressly agrees to indemnify and save the railroad harmless from and against any and all claims for losses, damage, injury and liability howsoever same may be caused,"——

Mr. Healy: That is right.

The Court: ——“resulting directly or indirectly from [56] work covered by this agreement.”

Mr. Healy: That is right; I think it is stronger.

The Court: That is much stronger.

Mr. Healy: I think it is stronger. I am candid in everything I say: I think it is stronger, but I am citing now that case particularly for this, to rebut Mr. Boyd's contention that such contract is not valid unless it expressly covers the indemnitee's own negligence.

The Court: Judge York, who wrote this decision, covers it. He says,

"The indemnity clause in the contract, undertaking, as it does, to indemnify railroad company from and against 'any and all claims, loss, damage, injury and liability howsoever the same may be caused, resulting directly or indirectly from work covered by this agreement,' is so sweeping and all-embracing in its terms that, although it does not contain an express stipulation indemnifying appellant against liability caused by its own negligence, it accomplishes the same purpose."

Mr. Healy: All right. Can't we say the same thing here? Is there anything broader——

The Court: You can't say the same thing here, Mr. Healy, because you haven't got that language.

Mr. Healy: Can't we say it from this standpoint: is there [57] any word in the English language more embrasive than the word "all"? That word is used right here—"agrees to protect and indemnify the buyer against all claims for damages"; it doesn't say "howsoever caused."

The Court: It says, "which may arise due to difficulties encountered while vendor is servicing his operation."

Mr. Healy: That has been stipulated to, that these fellows were within the course of their employment. That means no more than that. Certainly they wouldn't indemnify them if they were off at a dance; it means while they were on this job.

I say this to Your Honor: Mr. Boyd asked me whether or not when I said, "sole negligence," would that exclude negligence upon the part of the defendant. I said it would, Your Honor, because you can't have any more negligence than sole negligence. And I say you can't have any more claims than all claims. By the same token, sir, if it is all claims and all lawsuits, it is going to take in everybody's claims and everybody's lawsuits.

To add what was in the Fellows case, "whether caused by one or the other or howsoever caused—" I think that is the wording in the Fellows case—is, if we are going to be technical, merely redundant. If I say, "I will indemnify Austin against all claims"—

The Court: That is not the reasoning of the Appellate [58] Court of California in this Fellows case. The Judge there in writing the opinion does not reason on the basis that "all claims" was sufficient; he reasons on the basis that since the language is "howsoever the same may be caused" that that indicates an intention to in no way single out the claims as to causes at all, and he says that because he says that it is so sweeping and embrasive in its terms that although it does not contain an express stipulation of an indemnity against liability caused

by its own negligence, it accomplished the same purpose.

Mr. Healy: Well, I don't think I was saying anything contrary to Your Honor's last few remarks.

The Court: You seem to think that since it says "all claims for damages arising out of the course of the work that that is just as clear in broadening the liability on the part of the indemnitor, just as broad and all-embracing as if it did contain this more broad statement that was used in the Fellows case.

Mr. Healy: I do, sir. If I were to indemnify someone for all claims—to quote the Declaration of Independence, "All men are created equal"—that means all men——

The Court: I can follow you on circumstances where a contractor and sub-contractor engage themselves by contract and where the purpose is, of course, that the contractor shall not incur any liability by virtue of damages that might ensue [59] as a result of work done by the sub-contractor, that the sub-contractor, unless he particularly engages himself to that end, is not engaged in the business of insuring the main contractor against his own misfeasances, therefore, that being the case, more particularization would be needed in fastening that kind of liability upon the sub-contractor.

Mr. Healy: Isn't that where you get yourself into the provisions that we have right here?

The Court: If it was an insurance company whose business it is to indemnify, then you would

find the Courts, of course, extending and applying the most liberal doctrine as to liability against the insurance company, because it is the business of an insurance company to indemnify against all claims and demands. That is what it is doing; it is getting paid for the purpose of assuming that kind and type of liability, and hence the language which is used in policies that delimit liability of an insurance company are interpreted favorably to the insured. But when you have two people who are not insurers but are engaged in a different kind of activity, it would seem to me, from what I have read on this subject, that to impose upon one party to this kind of contract an insurance liability for which insurance companies get paid would be to extend the doctrine with which we are concerned here beyond the limits of reason.

While counsel says it is not against public policy to have [60] such an agreement, I think that what is meant by that is that it is not against public policy because of the fact that insurance is permitted to protect one against the consequences of his own negligence, and it could well be argued that since the State permits a man to pay for protection against his own negligence, that there would not be anything against public policy in allowing any one to contract on that basis to protect himself against his own negligence whether it be with an insurance company or not.

But I don't think we are here concerned with any question of public policy. What is before us her-

is whether under the circumstances in which this contract was written, the status of the parties, what their respective engagements were, what they were to do, the nature of their work, the nature of their relationship to one another as to whether or not by the language contained in paragraph 7 of this contract that that meant that the sub-contractor was to become an insurer of the main contractor, to protect the main contractor against the consequences of the main contractor's own negligence. That is really the whole question, and I don't think that there is any evidenciary matter that is of any consequence here except the fact that we have here two contractors; that they made this contract between them; the nature of the work in which they were engaged; what happened, how it happened, and whether or not under the circumstances that we have here that clause [61] means that the sub-contractor must indemnify the Austin Company against the consequences of its own negligence.

We can forget about the insurance company which is the plaintiff, because it merely is asserting the claim which has validity only if it could be asserted by the contractor.

Mr. Healy: Oh, yes, no doubt about that. I would like you not to be unmindful of this——

The Court: You go ahead.

Mr. Healy: I didn't mean to interrupt you; I am sorry.

The Court: You go ahead. I have read during the noon recess this case which Judge Erskine cited, and of course there he cited that case mainly be-

cause of the fact that the sole question before the Appellate Court there was whether or not the evidence was admissible to vary, to explain the meaning of a provision of the contract which was ambiguous.

Mr. Healy: And they held it was.

The Court: The Appellate Court reversed it.

Mr. Healy: No, affirmed it.

The Court: The Appellate Court affirmed the Trial Court in that instance in letting the evidence in. The Trial Judge held in the Pacific Indemnity case that the provision of that contract did not constitute an agreement to indemnify the contractor against his own negligence

Mr. Healy: In the light of the explanatory evidence.

The Court: But the Appellate Court did not pass on that [62] precise question, but merely held that the provision in the contract was ambiguous.

The lower Court held that it did not bind the subcontractor, and the upper Court held that because the provision was ambiguous, it was proper to admit evidence. And on that basis, Judge Erskine, apparently feeling that this provision was ambiguous, denied the motion to dismiss on that ground. It is true, I think, that perhaps if I were deciding that motion in the same position, in the exact same position that Judge Erskine was, I would have also denied the motion to dismiss, but I would have denied it or reserved a ruling on it, on the theory that the Court ought to have more

facts than circumstances before ruling on the effect of the agreement.

And I think that is a very wise procedure to follow, because on a motion you get just what the attorneys want you to have; when you have got all of the circumstances, you are in a position to know more about the case and perhaps make a juster ruling.

The provision in that case—I suppose you are familiar with it——

Mr. Healy: Oh, yes.

The Court: ——was even more specific than the provision in our case. I am referring now to the provision in the Pacific Indemnity case. The provision in that contract was:

“You agree that work described herein will be [63] performed by you, and as an independent contractor and not as an employee of the company. You will indemnify and save Company harmless from and against any and all loss, damage, injury, liability, and claims therefor, including claims for injury or death to company’s employees and damage to company’s property and claims of liens of workmen and materialmen, howsoever caused, resulting directly or indirectly from the performance of this agreement; and will obtain and maintain in effect insurance, including Workmen’s Compensation insurance, to protect Company from the above in amounts satisfactory to the Company.”

There is a more comprehensive clause and still the Court held that ambiguous in that case.

Mr. Healy: There are two or three things that you must not lose sight of in that case. That is an action for declaratory relief in which the trial Court sitting without a Jury had before him the contract, and then he received extraneous evidence to shed light upon what the intent was. Then he made findings of fact and conclusions of law that it was never the intent to cover the negligence of the Standard Oil Company. Then the Standard Oil's insurer, the P. I., took it up on appeal, and their sole contention was that the trial Judge was in error in holding in this way. That is all [64] the Court was really deciding, whether or not it was permissible to bring this parol evidence in. Once they found it permissible to bring it in, they weren't going to disturb the findings of fact of the trial Judge. I think that should not be lost sight of.

The Court: That is correct.

Mr. Healy: Judge, I would like to say this, in none of these cases do we find—I don't see how we can get away from the fact in this case that this Viking Company agreed to carry insurance. Now, look; they agreed to carry insurance, and they agreed to even name, under certain circumstances—if you will look at the third paragraph of that Article XII back on page 3, they agreed under certain circumstances to name the contractor, that is the Austin Company, as an additional assured, and they also provided that certificates of all such insurance should be furnished to the contractor.

Now I am going to ask this question, to pose this question: Why is the Austin Company interested

that the Viking Company have insurance? What did they care whether they have insurance? If it is a sub-contractor they could commit all the torts in the world and Austin Company could not be responsible, could they, under the familiar rule that there is no imposition of tort liability between a sub-contractor and contractor? If they are true independent contractors—and that is what they were here—there cannot be any imposition [65] of vicarious liability. So what are they talking about insurance for here or lawsuits? Doesn't it all dovetail right back that there is a reason for it?

Your Honor said this, or maybe Mr. Boyd said it, that they took this cost-plus, a fixed fee contract. The fee was ten per cent. Can't we reasonably assume that it would have been cost-plus only eight per cent or something less, if they did not have to take this public liability insurance in rather high amounts? It costs money to carry that much insurance. If it was an ordinary contractor putting in a sprinkler system he would be willing to do the job for a little bit less if he did not have to carry public liability insurance. That isn't an unreasonable assumption. But he is bound to carry high limits, to furnish certificates of it to the contractor, to the Austin Company, and in certain instances to even name the contractor, the Austin Company, as an additional assured.

I say why? What would they care whether they had insurance or not, unless there is some meaning to it?

I ask you again not to lose sight of the fact—I

know you won't—but this is a motion for a nonsuit and we have got to take this thing in the light most favorable to this plaintiff.

I could argue the law question, but I am convinced I have now covered everything——

The Court: What you have said would equally apply to the [66] contractor in its relationship to the United Airlines. The United Airlines undoubtedly required the contractor to carry public liability insurance.

Mr. Healy: They may have; I have never seen the contract.

The Court: I assume they must have. I don't suppose people enter into a contract these days without requiring the contractor to furnish public liability and compensation insurance.

Mr. Healy: Let's forget compensation.

The Court: As a matter of fact, the owner always insists upon that paragraph, as I recall it, that the contractor have that kind of insurance, and it is regarded as a part of the cost.

Mr. Healy: That may be as a practice, Judge, but we are looking at this thing from a legal standpoint. And we know that there can be no imposition of liability upon the contractor for the tort of the independent sub-contractor except under certain circumstances—non-delegable duties and the like.

Suppose some child was around or some visitor, and the Viking Company dropped a big hammer on top of his head, could the Austin Company be held for that? Certainly not. If it came into your Court

you would have to grant a non-suit against the plaintiff. [67]

Why is this Austin Company solicitous here that the Viking Company carry public liability insurance and in certain instances name them? I say because it all adds up: they intended to. This was artfully drawn; this wasn't just thrown together: "For all claims"; it can't be any more universal, and they have to carry insurance against "All claims for damages, lawsuits, etc." I don't like that "et cetera"; I say I don't like it; I don't know what it means, but I am not worried about it.

The Court: But you have to read the whole clause.

Mr. Healy: Yes.

The Court: And fairly reading the clause, you find this: that is starts out by saying that: "It is understood and agreed that vendor"—that is the Viking Company——

Mr. Healy: Yes.

The Court: ——"is fully covered with public liability, Workmen's Compensation and property damage insurance." That means, of course, that the vendor has protected itself against liability which may be against it of any nature—public liability—as it protected itself against public liability or Workmen's Compensation or property damage.

"It is understood that the vendor is fully covered"—in other words, that the vendor has protected itself; then it goes on to say: "And agrees to protect and indemnify the buyer against all claims for damages, lawsuits, etc., [68] which may

arise due to difficulties encountered while vendor is servicing the operation.”

If I were the attorney for your opponent in the matter, I would argue that that provision is not ambiguous; that it is clear that what is referred to there is liabilities that are incurred by the vendor in its operations, and not by anybody else; and that it is against those failures, misfeasances and other activities of the vendor for which insurance protection is to be carried and should be carried, and that that does not mean that the kind of insurance that is spoken of there is insurance against the misfeasances or negligence of somebody else, because there is no reason arising out of the contractual relationship that anyone else except an insurance company engaged in that kind of work should engage in that kind of indemnifying arrangement.

So that it seems to me that you can read right into the clause there that what was intended that insurance should cover and the indemnification is coincident with the kind of insurance that is required to be written.

Mr. Healy: Your Honor read something here that is not there, if I may respectfully say so.

The Court: No, I am reading the whole sentence. It is all one sentence. Let's read it together.

“It is understood and agreed that vendor is fully covered with public liability, Workmen's Compensation [69] and property damage insurance”——

Now the sentence doesn't stop there.

Mr. Healy: No.

The Court: —“and agrees to protect and indemnify the buyer against all claims for damages, lawsuits, etc., which may arise due to difficulties encountered while vendor is servicing this operation.”

Mr. Healy: Yes, but you read something else in, Your Honor, when you read it the first time when we were discussing it. Your Honor said after the words “fully covered with public liability insurance” means liability for its own dereliction. Why do you read that in? Right at that point you read that in when you were discussing it with me. Why do you say that?

The Court: Because he is the vendor under the contract. Why should that be interpreted that the vendor is protecting the main contractor? There may be a dozen sub-contractors on the job.

Mr. Boyd: There were, Your Honor.

The Court: There may be more than one main contractor on the job. Why should you read that to cover anything more than the activities in which the vendor is engaged under its own contract?

Mr. Healy: I will tell you why: Because in the very next clause, not a new sentence, this vendor is agreeing to indemnify the vendee or the Austin Company for all damages [70] against losses. Maybe I haven't explained my idea there.

The Court: If your interpretation of that is correct——

Mr. Healy: That is the way he has got it there.

The Court: —then the clause “which may arise due to difficulties encountered while vendor is servicing this operation” would mean that, under this provision, the vendor would be liable for all damages and claims which the vendee might suffer during the period of time that the vendor was functioning under this contract, irrespective of whether they had anything to do with the vendor’s contract.

Mr. Healy: Oh, no, no.

The Court: It doesn’t say, “Due to the”——

Mr. Healy: Yes, it does.

The Court: It says, “Due to difficulties encountered while vendor is servicing this operation.”

Mr. Healy: Yes; that is the Viking Company.

The Court: It doesn’t say, “Difficulties encountered by the Viking Company.”

Mr. Healy: The vendor is the Viking Company, Judge.

The Court: I am just pointing that out to you as another basis. That merely fixes the time period, that is all that does, while their contract was in effect, while the Viking Company’s contract is *in* effect—if your analysis of the meaning of this language is correct, that during that period of time, the Viking Company would be liable for all loss and [71] damage which vendor might suffer because of any claims.

Mr. Healy: That would be an unreasonable construction. You mean if somebody else got hurt——

The Court: It is somebody else that is involved here. It isn’t the Viking Company that has caused

any damage here, so if somebody else is meant by that, that is somebody else under that provision of the contract.

Mr. Healy: I think that means arising out of their servicing. It is stipulated that these fellows were employees of the Viking Company, they were working in the course of their employment, and they were hurt.

Your Honor, again I say I don't think I have made myself clear; I really don't. I don't want to labor the argument and take up too much of your time——

The Court: That is all right.

Mr. Healy: Your Honor, the way I read this thing and these provisions about insurance runs as follows: That the only reason that the Austin people, who drew all these contracts, that is true, were solicitous that there be insurance on this Viking Company—because otherwise they wouldn't care—was because they, themselves, felt that if they were negligent they could look to the Viking Company for reimbursement; but maybe the Viking Company may be defunct, in liquidation; maybe they can't do it, so they say, "You carry insurance, and you give us these certificates." [72]

Again, I say to Your Honor as a lawyer, you can't get around the fact that tortuous activities on the part of a sub-contractor will not and cannot impose liability on the Austin Company. Therefore, why would they give a hang whether they had insurance or not if it was not for the very reason I discussed?

The Court: There may be a number of reasons why they would want to do it.

Mr. Healy: For instance?

The Court: The work might be stopped and the contract might be interfered with because of the fact that the vendor here, the sub-contractor——

Mr. Healy: The State might step in?

The Court: ——was not able to complete his work, or there was difficulty against which he was not insured that might be the proper function of the main contract, and then they didn't want to be joined.

Of course, the answer to all of that is that obviously the Austin Company did not have that thought in mind, because they carry their own liability insurance to protect themselves against their own liability.

Mr. Healy: For all we know——

The Court: That is the clearest indication in the world that they did not have any such thought but they were looking to the vendor, to the sub-contractor, for damages and any [73] insurance company that he might have for that damage. They just didn't have that in mind.

Of course, this is a nice thought so far as the insurance carrier is concerned, and if it can, through the medium of subrogation recoup any of what it is called upon to pay, it is perfectly proper for it to do so. But you can't do so unless the Austin Company had this right on its part. And it seems to me that that is just completely incompat-

ible with the circumstances under which this agreement was entered into and with the actions of the Austin Company itself. It had its own insurance; it had no reason to worry. It had no reason to ask a sub-contractor to protect it against the consequences of its own negligence. It already had adequate insurance covering it. That was within its own mind, that it wanted to protect against that, and there is no answer to that. It is completely at variance with the way in which a business is ordinarily conducted and these contracts are entered into.

I know there has been litigation on this very subject, because we have gotten these cases before us. And they come to us because of the ingenuity of principals and of competent lawyers trying to work out ways by which one who has suffered a loss may get some salvage on it and get it out of somebody else. That isn't an unusual procedure. And if you can do it, as the fellow says, it is nice business. if you can get it. I remember that being said when I was practicing law and I [74] remember representing some of these subrogation claims. But the question is, has the insurance company succeeded to something that was really a lawful and legal contractual right which the party insured had and which arises by virtue of a contract.

Mr. Healy: Your Honor made a remark there, that the Austin Company need not worry because they had their own insurance.

While this is outside the record, yet it may come in if the case proceeds, and I don't think—let me

put it this way: The fact of the matter is that Austin Company—I mean General Accident Insurance insures Austin Company all over the country, and I think insures them at a rate that takes into consideration these provisions. This thing all dovetails together.

The Court: I think that would be a very improvident insurance company which would base its giving insurance coverage on the theory that they might get something back by way of subrogation in this kind of a case. I understand that is true of automobile accident cases, that there is always a chance of getting something back from the other party who ran into the insured's automobile proceeding at an unlawful rate of speed at an intersection, etc., etc.

Mr. Healy: Yes.

The Court: But I don't think in contract cases that any [75] insurance company would let that enter into the calculation in fixing rates where there is general insurance issued of that nature, that they would have in mind some particular contract by which there may be a possibility of making recoupment. It might be; I don't know.

Mr. Healy: I was just going to say this, Judge: Mr. Boyd cited to Judge Erskine, 175 A.L.R. I notice you have it on the desk.

The Court: Yes.

Mr. Healy: At that time, as I pointed out to Judge Erskine, in that section that would lead one to think that a very strict rule of construction applies. Yet under subdivision G, page 144, a whole

section is devoted to the subject of Building Contractors and Subcontractors, and it would lead me to believe, from reading that, that the rule of construction is not as strict there as it is in some of these other types of relationships such as—I will just read the headnotes here——

The Court: I would think that would be so.

Mr. Healy: “Bailments, innkeepers, railroad companies, banks”——

All those are under different headings——

The Court: I would think you were right about that; perhaps it ought to be stricter in those particular cases.

Mr. Healy: It is much stricter in those cases. They [76] have innkeepers and pledgees and some others. It seems to be stricter in those other relationships than it is in the building contracts.

The Court: I wouldn't think that the decision would be made here on the basis of whether the construction should be stricter or not, but rather what is the fair and proper construction under the circumstances.

Mr. Healy: That is what it means, yes. Judge, I have said about all I can.

The Court: It is true that there are apparently a lot of cases on this question of indemnifying against the principal's own negligence.

Mr. Healy: Mr. Siebold wanted to point out something.

The Court: I will take a five minutes recess at this time.

Mr. Healy: Thank you.

The Court: If you are going to present any evidence, it couldn't take very long, could it, counsel? I am thinking in terms of what to do with the Jury this afternoon, that is all.

Mr. Boyd: Yes; I will say——

The Court: I would think, so far as the facts are concerned, that you could almost submit the case without any evidence. What you are going to do is to try and lug in something somebody said or did. As a matter of fact, the [77] actual undisputed circumstances are already in.

Mr. Boyd: Except that insofar as the Austin Company is concerned, there were certain conversations and so forth that they had which would indicate that they never had any intention of bringing out this hold harmless contract.

The Court: That might be after the event.

Mr. Boyd: Yes, subsequent proceedings, of course, after the negotiation of the contract. I would think it would probably take an hour or so to put in the evidence, possibly two hours.

The Court: I think I will send the Jury home. They can come back again. Will counsel stipulate that I can send word to the Jury without bringing them back to the Court Room; that they may be excused under the usual admonition of the Court?

Mr. Boyd: Yes, Your Honor.

Mr. Healy: Yes, Your Honor.

The Court: I think you had better bring them in.

(Thereupon, the Jury was brought into the Court Room.)

The Court: Members of the Jury: The Court and the lawyers are still wrestling with a rather perplexing legal question here, so we are going to send you home now. I am sorry we had to keep you so long out there in the Jury Room, but these things sometimes take time. I am not certain whether we will require you to come tomorrow morning at ten o'clock or not; but, pending anything further that you may hear, please [78] return tomorrow morning at ten o'clock. If it appears that your services will not be necessary tomorrow morning at ten o'clock, I believe the Clerk has ways of getting in touch with you and he will let you know; but as things now stand, please remember the admonition of the Court and return tomorrow morning at ten o'clock. We will recess.

(Recess.)

The Court: Mr. Healy, do you want to make a further statement?

Mr. Healy: Judge, I really haven't very much more to say. I did notice in this Pacific Indemnity case, as I pointed out to you earlier, that was a case in which——

There is something I wanted to say. Mr. Siebold asked me to call it to your attention. On this first page, right above insurance, in paragraph 6 there is a provision concerning patents. Did Your Honor see that? It says:

“Vendor agrees to hold and save purchaser harmless from and against all and every demand or demands of any nature or kind by

reason of the use of any patented invention, article or appliance, that has been or may be adopted or used in the construction of any of the material or articles called for on this purchase order.”

I want to call that to your attention, that those are seven different conditions which in reality form a part of this [79] order. They were things in which the vendor agreed, as Mr. Boyd would say, to hold harmless. There are two different definite things that we might classify as hold-harmless agreements.

I take it that if under that provision the vendor were to use some patented article, say a valve of some sort, and installed it, and it was discovered that that belonged to some other firm or person and that they had stolen it, we will say, or infringed upon their patents, and these other people came after the Austin Company and they would say in effect, “What are you doing, using our patented articles there?” Under that provision the Austin Company could come back to the Viking Company and ask, request, demand and secure reimbursement for any loss it might suffer. That is a loss that would be occasioned by the dereliction of the Viking Company in the inception; but anybody who continues to use a patented article with knowledge that it is stolen goods, I think there is a liability under the law. I am not familiar with patent law, but in a general way I understand this to be the rule: If a person continues to use an article that

is known to be a stolen or copied article, there can be a liability.

So we see then where this Sprinkler Company is obligating itself not only for its own dereliction in stealing the patent in the beginning but for the continuing dereliction of [80] the use of the thing.

Again, we have an instance right on that same page——

The Court: Again, there, it must be admitted that it is only articles that the Sprinkler Company itself would cause to be put into the job, so that it is acts on its own part that are referred to. It certainly couldn't be argued, could it, under the provisions of paragraph 6 that have to do with patents, but that obligation would refer to some material that the Austin Company, for example, would insist that they furnish and that the Sprinkler Company would be compelled to use.

Mr. Healy: No.

The Court: You couldn't argue that there would be a liability under that provision for that sort of thing, could you? Because it says: "That has been or may be adopted or used in the construction of any of the material or articles called for on this purchase order."

Mr. Healy: I see. Let us say they put in fittings or valves of the Crane Company. Maybe I didn't understand Your Honor's question. Suppose it put in some valves that were later developed to belong to X.Y.Z. Corporation, they had the exclusive license, and this Viking Company put them in knowing that it was performing a tortuous act, the

Viking Company could be held liable under the patent law.

The Court: The Viking Company could be held liable by the [81] patentee, yes.

Mr. Healy: That is what it is talking about, suits by a patentee. Then suppose that knowledge came over to the Austin Company, and there were just dozens of these valves all over the place, and they said, "All right; there they are, we know about them; we aren't going to do anything about them," I think the patentee has a remedy against the user of the article, too, from what little I know again about patent law. So again there would be two independent tortuous acts; one, the putting in to begin with; and, second, the continued use by the Austin people; and the Austin people would be able under this paragraph 6 as I read it, to require the Viking Company to hold it harmless for the dereliction of the Austin Company itself, the independent dereliction, the continued user dereliction.

The Court: That would be a strained sort of philosophy to inject into these kind of contracts; for example, we will say the Austin Company would specify that you had to use Crane pipe No. 422, of such and such specifications——

Mr. Healy: Yes.

The Court: Say pursuant to that specification, the Viking Company would use that, and they would find that after they used it that the patentee came along and sued them and also sued the Austin Company for continuing user. Now, would it be a

fair interpretation of that provision of the contract [82] under these circumstances that the Viking Company would have to defend the suit against the Austin Company to hold the Austin Company harmless from liability?

Mr. Healy: Isn't that what it says: "All and every demand or demands." Again we get our old word "all"; it can't be any more than all demands.

The Court: If that is the sole basis of the contention here, I think, as we told the Jury, that we do not check our common sense at the entrance to the Courtroom and that that would be so unfair an interpretation of the contract that good conscience would rebel against adopting it. It isn't the sort of thing—we don't just foist secret and unfair obligations of that kind; we don't interpret contracts except in a way that would justly effectuate the agreed purposes of the contract. Unless the parties have elected with their eyes open to perform some contract that would appear on its face to be very burdensome, the Court is not going to put that burden on them. Of course, we do not make a new contract for the parties, that is true; but in interpreting the contract we do not do something in the way of interpretation that would really be unjust.

The Insurance Company would pay this claim here. Personally, my view of the matter is that it would be extremely unjust, Mr. Healy, to foist this kind of liability under the terms of this contract on the Viking Company. Under the [83] background of the circumstances here involved, it would be ridiculous to assume that the Viking Company

was undertaking to hold the other company harmless from what might be the most grievous of misfeasances that it might commit, the most negligent acts of omission by which employees might be hurt, or third persons lawfully invited on these premises might suffer. It doesn't seem to me to be reasonable.

I appreciate that the Courts seem to have concerned themselves with some cases of this kind in the past, but at least in the two California cases that were cited,—although in one case the liability was recognized, was approved by the Court, and the other one it wasn't; but in both cases the provisions involved were certainly more specific and in neither of those cases was the Court called upon to interpret such a broad word as "all claims." Even in the case of general releases where "all claims" are mentioned, they still have to have a reasonable, pertinent and material relationship to the objects and purposes of the contract as disclosed by the contract against the background of the circumstances in which they are entered into.

I don't think that would be right, Mr. Healy; it doesn't seem to me that that interpretation would be proper under the circumstances as they appear here so far.

Mr. Healy: I have just two more thoughts and I will rest, Judge, if I may be allowed to. [84]

The Court: If this weren't a Jury case, I would be very glad to extend further time to you,—

Mr. Healy: Yes, I understand.

The Court: —to present anything that you

wish in connection with the matter. We do have a Jury case before us, and I think that cases of this nature should be promptly disposed of.

Mr. Healy: Absolutely.

The Court: I don't want to take any snap judgment in the case, but a Judge does have to rule on these matters when they come up in the course of the trial and procrastination is worse than no decision at all sometimes. It is better to determine these questions and if there is dissatisfaction there is always the right of appeal.

Go ahead with what you have to say.

Mr. Healy: These are the thoughts. When I was commenting upon paragraph 6 it was merely to point out that in these seven conditions there are two distinct provisions concerning themselves with holding the Austin Company harmless. Now, if you construe those two together and keep in mind Article XII that provides for insurance, does it not become all the more cogent that 7, which concerns itself with public liability and damages for personal injuries and the like—that that is a whole article devoted to the obligation of the subcontractor to carry the type of insurance [85] that would cover the liability I contend for under 7.

Under 6 I don't say that there is any corresponding type of insurance to cover Viking Company for any dereliction it might have in the field of patents. In other words, if Your Honor construes 6 as only to cover tortuous acts in the field of patents as of the torts of the Viking Company itself and not any torts over here by the Austin Company, doesn't the

whole thing become more apparent then? The Austin Company doesn't agree to that, and therefore they do not require them to carry insurance. But when you get over into the personal injury field it requires them to carry insurance. That is Number One. However, I won't labor it any further. If I said it fifty times, I couldn't say it any more clearly. That is that point. Again we are construing things.

I want to call Your Honor's attention to this language in the Pacific Indemnity case—how much stronger it is; it says:

“You will indemnify and save Company harmless from and against any and all loss, damage, injury, liability, and claims therefor, including claims for injury or death to Company's employees and damage to Company's property and claims of liens of workmen and materialmen, howsoever caused, resulting directly or indirectly from the performance of this agreement.” [86]

Now, I daresay to Your Honor that if the Trial Judge had gone the other way and had decided as a factual matter that he thought this covered the negligence of the Standard Oil Company as well as the negligence of the Electric Company, that the Court on review would have affirmed it. I daresay so. I do not think that is any stronger. There are more words, but again it doesn't do the thing that Mr. Boyd claims must be done exclusively in *haec verba* cover the negligence indemnity. It doesn't do that; it just says, “against any and all loss, damage, injury, liability, and claims therefor, howsoever caused.”

Now, if you can put in "howsoever caused" you can put in the time, place and everything else. If it is "all claims" it can't be more all-embracing. That is my second thought.

The Court: On that subject you have a further clause here that would throw grave doubt as to whether or not this clause 7 means "all claims howsoever caused," because the provision here is:

"Agrees to protect and indemnify the buyer against all claims for damages, lawsuits, etc., which may arise due to difficulties encountered while vendor is servicing this operation."

Now, would you say that a difficulty encountered by the vendor while servicing this operation would be a misfeasance of the vendee?

Mr. Healy: The vendor is the Viking Company. You mean [87] the other way, don't you?

The Court: Would you say that a difficulty encountered while the Viking Company is servicing this operation refers to and would include a misfeasance and negligence of the Austin Company?

Mr. Healy: I am really sorry; I don't get Your Honor's question. I hesitate to answer it; I just don't understand it.

The Court: All right; I will put it to you this way: In the other cases there is a clause in the contract that provides that there shall be an indemnification and saving harmless against all claims and demands howsoever they may be caused. This contract does not say that. This says,

"All claims for damages, lawsuits, etc., which may arise due to difficulties encountered while Viking is servicing this operation."

Mr. Healy: Yes.

The Court: Would you say that "difficulties encountered while Viking is servicing this operation" would by any stretch of the imagination refer to damages resulting from the sole negligence of the Austin Company? Would that be a difficulty which Viking would encounter in its operations under the contract?

Mr. Healy: No, I think it means that it must touch or concern some Viking operation, although the Viking Company [88] need not be the tortuous one.

The Court: But isn't that a description of the meaning of "all claims" that is referred to there?

Mr. Healy: I would never contend if a workman of X Company some distance removed in time and in place—let us say in place, but say the time was the same—some distance removed from the Viking operation—was injured through the dereliction of Austin men—I don't think that this was ever intended to hold Viking for it. I think that it all had to arise out of the Viking operation. And it is stipulated here that these two men were employees of and within the course of their employment on the job. That is all I think that means, Judge.

The last point is this: Let me put it this way: In this P. I. case they quoted from Murray vs. Texas Company, a South Carolina case. I will just read this sentence.

"We think the Trial Judge properly refused to grant the motion for a directed verdict on this ground."

I do not have who was moving for a directed verdict, but it must have been the defendants; they are generally the ones, though I am not sure.

“As stated by him, the provision of a contract relieving one of the parties thereto from liability for his or its own negligence should be [89] clear and explicit. While it is true that the language used in the quoted provision of the contract before us, that the agent shall hold the company ‘harmless from all claims, suits and liabilities of every character whatsoever and howsoever arising from the existence or use of the equipment at said station,’ is broad and comprehensive, it is, as stated by the Court below, provocative of some doubt.”

Now, I contend that at the most this thing is provocative of doubt, and I am standing, and my clients have asked me to stand on our legal rights. This is a motion to dismiss. And I say that if the Court has taken the view—though I thought it was the rule otherwise—that we are to explain the doubts, then I should be at least allowed to bring back Mr. Johnson again on that very question. We could take that evidence without waiting for tomorrow and the Jury; we could take it out of the presence of the Jury and if it goes one way, it could be read to the Jury. Is it not the rule on a motion to dismiss if the plaintiff has failed in any particular item of proof he should be allowed to supply that missing link, so to speak?

Certainly if what I have been informed—and I don't know, but that is what I want to explore—that this Company, this Viking Company are insured by an insurance company—[90] I have been told it is the Firemen's Fund—and they have a contractual rider on their policy, or rather a rider to cover contractual liability and they paid an extra premium for that, I submit that it has probative value.

The Court: Against what liability do you say they are insured?

Mr. Healy: I would say then it would be against their liability——

The Court: You say that they are insured against negligence of the contractor in this case, of the Austin Company?

Mr. Healy: Judge, I don't want to say anything that I couldn't prove. I have never seen it, and it is pure hearsay to me.

The Court: I can't convert the case into a discovery proceeding. Maybe the other side would stipulate, subject to its materiality.

Mr. Healy: We are entitled to question these adverse witnesses, aren't we?

The Court: Yes, that is true, but, of course, I think that proper caution should dictate to you not to ask something like that unless you are fairly certain that you are going to get a favorable answer. If you asked that question and it developed that it wasn't true, you would be much worse off than you are now. I think that is something that you should have discovered before the trial, not in

the trial. However, [91] I am not meaning to be critical; I am just merely suggesting that that might be harmful to you to present. That is a matter which should have been gone into before the trial commenced.

Mr. Healy: I believe under the rules here, that are the same as the State Rules, I can question an adverse witness without being bound by his adverse answers.

The Court: Yes, but if you weren't bound by their answers, there would still be in the record something that would be very strong against you as to the intention on the part of the other side. I don't think that would particularly avail you.

Mr. Healy: We ask permission to question the man along those lines.

The Court: Of course, we have got a Jury here now.

Mr. Healy: I say why couldn't we do that right now here? I don't know. If it developes that—

The Court: Of course, the Jury wouldn't hear the witness testify. If it would determine that there was some factual matter, why, that might possibly go to the Jury. I don't know that there is anything so far—there certainly isn't anything in your case as it is now submitted that requires anything to go to the Jury. Your opponent could rest the case now.

Mr. Healy: That is a correct statement. I believe, if my contentions are correct, if there were no more evidence, [92] Your Honor would have to

instruct the Jury to return a verdict for the plaintiff, I would think, because, as you say, there is no factual issue, there is no dispute.

The Court: I don't know. Your opponent says that he wanted to present some evidence as to conversations held afterward, which I think in all probability might be excluded because of the fact that it has no reasonable relationship to the time in which the contract was entered into and did not form a part of the making of the contract, unless it would be admitted as evidence of some sort of an adverse admission. That would be the only theory upon which it could be proper.

Mr. Healy: May I intrude on Your Honor's thoughts? Back again to this question of discovery procedure——

The Court: I am perfectly willing if counsel is willing, in the absence of the Jury; but I don't see how we could do that in connection with this matter that is pending before us without reopening the matter and interrogating the witness if you wish to pursue that inquiry; but I think we would have to do it in the presence of the Jury.

Mr. Healy: The testimony could be read to the Jury.

The Court: Well, if you wanted to enter into some sort of a stipulation, that is agreeable.

Mr. Boyd: Your Honor, I haven't said anything for some time; I have been waiting.

The Court: You were very wise. It is always the safer [93] and smarter thing not to say much when the Judge is talking for you.

Mr. Boyd: I appreciate that, Your Honor, but I really don't know what Mr. Healy hopes to prove by these questionings. I would like to ask what he expects to prove by further questioning. Maybe I will stipulate.

The Court: What is it?

Mr. Boyd: In other words, I will stipulate the Viking Company carried insurance for many, many years, there is no question about that, to protect themselves for liability imposed upon them by law, just the same as Austin Company carries insurance with the General Accident Insurance Corporation to protect them for liability imposed upon them by law. There is no doubt in the world about that. But my objection was made on the materiality of the questioning, particularly when the vendor-vendee agreement merely states in effect that the vendor represents that it will carry insurance. That has nothing to do with the hold-harmless part of the agreement. And certainly Viking Company has no coverage that agrees to assume liability for the sole negligence of the Austin Company. It would just be ridiculous to even ask them to pay for such insurance, particularly when the Austin Company already carries insurance.

The Court: Have I made myself clear?

Mr. Healy: You have made yourself clear, but I think [94] counsel has evaded the issue; that is, that we are talking informally, the Firemen's Fund Indemnity Company wrote a letter, and that is the source of my information, back to the Austin Company. These letters that we put in evidence by the

Austin Company to the Viking were apparently referred to the Firemen's Fund. I haven't the letter, but the gist of it was, "We respectfully decline liability for your claim." They never contended that they did not insure on it; they just denied liability.

Furthermore, I am told by Mr. Siebold that the manager of Firemen's Fund told them that there was a contractual rider on their policy. Counsel particularly said they never insured against the sole negligence of Austin. That is an argument, but ordinarily you do not have contractual riders on policies unless there is a reason for it, and I think it has probative force.

The Court: Then that is something that you should have inquired into before the case was filed, and then maybe you could have joined Firemen's Fund as a defendant and let the two insurance companies fight it out. In my opinion, that would have been a more just and appropriate way to determine it.

Mr. Healy: That is what they are doing in effect, anyway; we all know that—I mean, in effect. I don't think there is any doubt but what the Viking Company is being protected [95] by the Firemen's Fund in this very suit.

Mr. Boyd: Well, certainly, counsel, I think that you will agree that the Firemen's Fund stands in the same position as the Viking Company, the same as your concern does as to Austin.

Mr. Healy: That is right.

Mr. Boyd: So we are right back to where we

started: What is the agreement between the two companies?

The Court: I think you are correct about that, yes.

Is this motion submitted?

Mr. Healy: I ask permission to question that man upon his policy. I think you can take that outside of the presence of the Jury.

The Court: To save your record in the matter, I will hold that that is immaterial, and I will sustain the objection to that testimony as to the purpose for which it is sought.

Mr. Healy: It will be understood that I have asked the question clearly, we all understand the force of it, and it was argued.

The Court: It will be understood that you have asked the same question again that you asked previously, and that I sustained the objection on the ground that that is immaterial to the resolution of this question.

Mr. Healy: Very well. [96]

The Court: So that your rights are protected,—
at the conclusion of plaintiff's presentation of its case, the defendant has made a motion to dismiss this case.

It appears to the Court, upon the evidence presented in behalf of plaintiff, that there has been a failure to present facts sufficient to sustain the allegations of the complaint in this case.

In the opinion of the Court, paragraph 7 of the contract between the defendant and the Austin

Company does not give rise to a cause of action on behalf of the plaintiff to recover for the damages paid and expenses incurred due to the negligence of the Austin Company.

In my opinion, the provision of the contract itself is not susceptible to that interpretation. The case is different from the cases cited which were decided by the California Courts where provisions of contracts somewhat comparable were involved, because in those cases the contracts specifically provided that the alleged indemnitor should assume liability for all claims and damages however caused during the performance of their contract.

The particular provision of the contract in this case is limited, and, in my opinion, does not fall within the purview of the rule asserted in the California cases that have been referred to.

I think there is nothing presented by way of evidence in [97] this case that would justify the submission of the case, and there is nothing, so far as I can see, that could be presented by the defendant that would aid the Court in determining the matter. All of the circumstances that are necessary for an evaluation of the liability of the defendant are before the Court, having been presented by the plaintiff in this case, and anything beyond that would consist of hearsay or ex post facto discussions which would not be legally pertinent so far as the issue of the interpretation of this provision of the contract is concerned.

Accordingly, the Court will grant the motion for a dismissal upon a finding of the Court that the

evidence affirmatively shows that the liability asserted does not, under the contract between the parties, rest upon the defendant in this case.

I think, under the provisions of the rule, that findings should be presented on the motion to dismiss even though it is a jury case. It would serve to indicate in a factual way the basis upon which the ruling of the Court is made.

Certificate of Reporter

I, W. A. Foster, Official Reporter and Official Reporter, pro tem, certify that the foregoing transcript of 98 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

/s/ W. A. FOSTER.

[Endorsed]: Filed March 26, 1951. [98]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as provided in the stipulation of attorneys for record on appeal:

Complaint for damages.

Notice of motion to dismiss.

Order denying motion to dismiss (Judge Erskine, July 24, 1950).

Answer.

Findings of fact and conclusions of law.

Decree.

Notice of appeal.

Stipulation for record on appeal.

One volume of testimony.

Plaintiff's exhibit 1.

Plaintiff's exhibit 2.

Plaintiff's exhibit 3.

Plaintiff's exhibit 4.

Plaintiff's exhibit 5.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 30th day of March, 1951.

[Seal]

C. W. CALBREATH,
Clerk.

By /s/ D. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 12889. United States Court of Appeals for the Ninth Circuit. General Accident Fire and Life Assurance Corporation, Ltd., a corporation, Appellant, vs. Viking Automatic Sprinkler Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 30, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

[Title of Court of Appeals and Cause.]

STIPULATION FOR CONSIDERATION OF
ORIGINAL EXHIBITS BY COURT WITH-
OUT NECESSITY OF REPRODUCTION
IN THE RECORD

It is Hereby Stipulated by and between appellant and appellee, through their respective counsel, that all the original exhibits introduced in evidence in the District Court, except Plaintiff's Exhibit No. 1, may be considered by this Court and referred to by counsel in their original form without the necessity of reproduction in the record.

Dated: April 3, 1951.

HEALY & WALCOM,

/s/ JOHN J. HEALY,
Attorneys for Appellant.

BOYD, TAYLOR &
REYNOLDS,

/s/ ROBERT F. REYNOLDS,
Attorneys for Appellee.

So Ordered:

/s/ WILLIAM HEALY,
Chief Judge.

/s/ WM. E. ORR,
United States Circuit Judge.